THE REFORM OF PROCEDURE IN THE COURTS OF NEW YORK

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THE REFORM OF THE PROCEDURE IN THE COURTS OF THE STATE OF NEW YORK

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INTRODUCTORY

The State Bar Association has been active for nearly a quarter of a century in endeavoring to secure a reformation of the practice in the courts of the state as embodied in the Code of Civil Procedure.

A great many papers on this subject have been read by learned members of the association at its annual meetings, and while these efforts have not been entirely successful they have not been entirely fruitless.

After persistent and long-continued agitation, a bill, approved by the association, creating a commission to revise the Code of Civil Procedure was enacted by the legislature, but the purpose of the bill failed when the governor appointed the members of the Statutory Revision Commission then in office to perform the difficult task. The association, however, was not discouraged by this failure, but kept up the agitation, and its efforts were again rewarded by the passage of the act creating the Board of Statutory Consolidation, vesting in the board power to consolidate the statutes as well as revise the practice in the courts.[1] This time the names of the persons constituting the board, all members of this association, were inserted in the act and the result of the labors of the board, as we all know, was the consolidation of the general substantive statutes of the state and the adoption by the legislature of the Consolidated Laws.

The board, however, found that it was physically impossible to accomplish both the consolidation of the general substantive statutes and the revision of the practice, and therefore directed its efforts to the completion of the former,

[1]The Board of Statutory Consolidation was created by L. 1904, ch. 664. The members are Adolph J. Rodenbeck, Chairman, Rochester, N. Y.; William B. Hornblower and John G. Milburn, New York City, and Adelbert Moot, Buffalo, N. Y.; Frederick E. Wadhams, Secretary, Albany, N. Y.

leaving the latter for subsequent and independent treatment. The board, therefore, did not revise the Code of Civil Procedure, but it prepared the way for a revision both by the consolidation of the substantive statutes and the removal from the code of more than five hundred sections or parts of sections of a substantive character. It was deemed best to leave the whole subject of the practice to be considered in its entirety apart from the work of consolidating the substantive statutes. "So delicate and difficult a task," says the board in its introductory note on the Code of Civil Procedure, "is that of revising the present practice of the State, which has been in use for over thirty years, that it was deemed the part of wisdom to leave this work as a separate and independent task when the attention of those entrusted with it would not be diverted or divided by the consideration of other matters."

The board has sent to the legislature its final report, and there is no disposition on the part of the members of the board, so far as I know, to undertake the work of revising the practice in the courts. This work, therefore, must be taken up by other members of the profession.

Without the great learning, wide experience, sound judgment and sacrificing labors of Hon. John G. Milburn, Hon. William B. Hornblower and Hon. Adelbert Moot, the work of statutory consolidation just completed would not have been accomplished and it is a source of great regret that the services of these eminent members of the profession can not be retained in behalf of the people upon the remaining task of revising the practice in the courts.

It is therefore proper that this association should consider this subject and be prepared to urge upon the legislature the importance of taking such action as will remedy the existing evils in the civil and criminal practice in the courts of the state.

The whole subject of the delay and expense of litigation is embraced under four heads: (1) Courts, (2) Procedure, (3) Judges, (4) Lawyers. Each of these plays an important part in the judicial administration and contributes more or less to its character. If the courts are not properly organized there is likely to be a waste of judicial power, conflicts of authority, unnecessary appeals and other evils which go a long way toward complicating the administration of justice. The personnel, mode of selection and tenure of the judges has much to do with the delay and uncertainty in the courts, and the character of the members of the bar itself plays an important part in the administration of the law. All of these factors have I think received more attention in this state than the correction of the evils of procedure.[2]

NECESSITY FOR A REFORM OF THE PROCEDURE IN THE COURTS

It will hardly be necessary to cite authorities upon the question of the necessity for a reform of the procedure in the courts.

The administration of the law has met and always will meet with criticism. Every lawyer knows that the law is

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[2]A special committee of the American Bar Association to suggest remedies and formulate proposed laws to prevent delays and unnecessary cost in litigation consisting of Everett P. Wheeler, Roscoe Pound, Charles F. Amidon, Joseph Henry Beale, Frank Irvine, Samuel C. Eastman, William E. Mikell, Henry D. Estabrook, Edward T. Sanford, Charles E. Littlefield, Charles S. Hamlin, Charles B. Elliott, George Turner, John D. Lawson and William L. January, made a report to the Association in 1909, in which it submitted the unification of the judicial system as the first principle which should control in the judicial organization as follows:

> "The whole judicial power of each state, at least for civil causes, should be vested in one great court, of which all tribunals should be branches, departments or divisions. The business as well as the judicial administration of this court should be thoroughly organized so as to prevent not merely waste of judicial power, but all needless clerical work, duplication of papers and records, and the like, thus obviating expense to litigants and cost to the public." (p. 589.)

ever seeking to keep pace with society and ever falling behind. Human society advances at times by leaps and bounds, while the law comes limping and hobbling along. Decisions and statutes become infirm, decrepit, and die, but the world moves on, crowding the statutory "sick, sore and lame" into the background. The survival of the fittest applies here as in life itself. This idea was expressed by Wendell Phillips when he said, "Ideas strangle statutes," and by Lord Coke when he said, "Human laws are born, live and die." No system ever devised is or has been entirely free from fault or complaint. Shakespeare speaks of "the law's delay," "old father antic the law," "nice sharp quillets of the law." Tennyson refers to "the lawless science of our law." Goldsmith said that the "Laws grind the poor, and rich men rule the law." Braithwaith said:

> "Laws are like spiders' webs, small flies are ta'en
> While greater flies break in and out again."

Colton said that in civil jurisprudence it too often happens that there is so much law there is no room for justice and that "the claimant expires of wrong in the midst of right, as mariners die of thirst, in the midst of water," and Charles Macklin said that "the glorious uncertainty" of the law is of "mair use to the professors than the justice of it."

Numerous similar sentiments might be quoted, going back over the whole history of the law itself, but there is not wanting also abundant expressions of confidence in the law, like the exalted words of Hooker, "Her seat is the bosom of God," and the lofty sentiment of Sir William Jones:

> "And sovereign law, that state's collected will
> O'er thrones and globes elate,
> Sits empress, crowning good, repressing ill."

The only question in each period of agitation is whether or not more than the normal amount of dissatisfaction exists and whether or not it is justified. The complaints against the administration of justice in this state are as old as the state, but when the efforts of the state for the revision of its procedure in the courts is examined it must be admitted that very little has been done to satisfy these criticisms. The common law system of England and the greater part of the statutory law of that country was appropriated by the state when the state was organized, and while there have been repeated consolidations and revisions of its substantive statutes, there was no marked change in the practice of the courts of the state until the adoption of the Code of Procedure in 1848. Until that time the common law system of the mother country prevailed, with its numerous forms of actions and its technicalities and arbitrary distinctions. The consolidation and revision of the substantive statutes of 1789, 1801 and 1813 did nothing with the practice in the courts, and the distinguished revisors of 1829 merely incorporated into the Revised Statutes the existing practice.

The conditions became so bad that a clause was inserted in the state constitution of 1846 requiring a revision of the practice, and it was pursuant to this demand that the Code of Procedure was adopted. This was a long step forward. A period of inactivity followed this important change in the practice in the courts until the revision of 1876, when the first part of the present Code of Civil Procedure was adopted. This change is generally regarded as a step backward. Whatever the defects were in the common law practice, which the Code of Procedure largely abolished, the Code of Civil Procedure, by its attempt to regulate the details of practice, created a condition nearly as bad as that which prevailed under the early system of practice.

Since the adoption of the Code of Civil Procedure there has been constant complaint and criticism. David Dudley Field was one of the most strenuous opponents of the adoption of the Code of Civil Procedure, and could find no language strong enough to express his condemnation of the act. On one occasion he said it was an "attempt to force upon the people of this State a meretricious and abortive scheme which will keep you in perpetual trouble which will never have an end." An eminent member of the New York City bar described it as a "legal monstrosity," as having been "built up under a microscope," and "procedure run mad." Another distinguished member of the same bar called it the "degenerate mother of so many illegitimate offsprings," and said that it "ought to be cut up by the roots." In an address before the Michigan Bar Association another leading member of the bar of the state said, "it seems to be the best example of a thoroughly vicious piece of work foisted upon a long suffering profession under the guise of improvement and revision which it would be possible to frame." The Commission on the Law's Delays in New York and Kings counties said that to say that the tardy justice now administered in the courts of record of the state of New York meets the requirements of modern business life is to proclaim that "which is by common knowledge erroneous." Mr. Justice Hughes, when governor of the state, in a message to the legislature, urged upon their attention "the importance of simplifying the procedure of our courts." President Taft, in a speech before the Virginia Bar Association, said: "The inequality that exists in our present administration of justice, and that, sooner or later, is certain to rise and trouble us and to call for popular attention and reform, is the unequal burden which the delays and expense of litigation under our system impose upon the poor litigant."

He again referred to the subject in his recent message to the congress, wherein he said, among other things: "One great crying need in the United States is cheapening the cost of litigation by simplifying judicial procedure and expediting final judgment."

It is not my purpose to discuss further the subject of the necessity for reform in our procedure, which, as David Dudley Field and John F. Dillon said, "every lawyer knows, and every suitor knows better," but rather to assume that such a necessity exists; nor is it my purpose to seek for the causes of the dissatisfaction that prevails in the administration of justice, but also to assume that the dissatisfaction is intimately connected with the procedure in the courts as controlled by the Code of Civil Procedure, the correctness of which assumption is borne out by the fact that past efforts to remedy the evils in procedure have been largely directed towards the revision of the Code of Civil Procedure.[3]

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[3]The Commission on the Law's Delays enumerated the following as the principal causes of the conditions that prevailed in the administration of justice in New York and Kings counties:

1. The increase of litigation resulting from increase of population and business activity.
2. The inadequacy of the judicial force, and the constitutional restrictions upon its increase by the legislature.
3. The arrangement of the judicial force which has resulted in strengthening the appellate branches of the courts at the expense of the trial branches.
4. Defective methods of procedure.
5. The practice which has grown up as a result of the congested condition of the calendar of interposing sham defences to secure a delay which is often equivalent to victory.
6. An incompetent and costly referee system.
7. Defective calendar practice, and the failure to classify cases for the purpose of trial.
8. The multiplicity of appeals.
9. The failure to keep and publish annually judicial statistics by means of which the people could be definitely informed as to the conditions of the courts.
10. The aggression of politicians upon the courts and the baleful practice of political contribution by judicial candidates.

(Report of the Commission on the Law's Delays, p. 48.)

EFFORTS HERETOFORE MADE FOR THE REFORM OF THE PROCEDURE IN THE COURTS

While there has been abundant criticism of the present Code of Civil Procedure and a great deal of discussion upon the subject, no general revision has been accomplished since its enactment. Prior to the adoption of the Judicature Act of 1873 there had been a number of commissions appointed in England to consider the subject of the practice in the courts, while in this state there have been but two acts passed, since the adoption of the Code of Civil Procedure, which conferred any authority to revise the practice as a whole. The first act, passed in 1895, failed because the work was entrusted to the then existing Statutory Revision Commission, who were already burdened with the task of consolidating and revising the substantive statutes of the state.[4] The last act was that creating the Board of Statutory Consolidation. This board, while it prepared the way for a general revision of the practice by eliminating substantive matter from the code, turned this subject over to other hands.[5]

The plans proposed by the various commissions, committees and bar associations may be reviewed as a preliminary to the discussion of the plan of revision herein suggested.

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[4] L. 1895, ch. 1036.
[5] L. 1904, ch. 664, see Final Report, Senate Documents 1910.

PLAN OF CODE REVISION OF THE STATUTORY REVISION COMMISSION

The Statutory Revision Commission proposed the separation of the Code of Civil Procedure into eleven Codes and Laws as follows:[6]

General Laws

1. Naturalization Law.
2. Drainage Law.
3. Insolvent Debtors' Law.
4. Condemnation Law.
5. Jury Law.
6. Evidence Law.
7. Statute of Limitations Law.
8. Judiciary Law.

Codes

9. Justices Code.
10. Surrogates Code.
11. Code of Civil Procedure.

The Commissioners learned in response to circular letters sent out that there was a "very strong proportion of sentiment in favor of a general revision," and that "the history of the development of Civil Procedure in this State shows that the time has arrived when it will be convenient and for the public interest to undertake a rearrangement and more thorough classification and a revision of our entire Civil Procedure," but their plan as presented to the legislature embraced merely a separation of the material contained in the code.

The plan did not contemplate an actual revision of the practice, and was criticized upon that ground and upon

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[6]The Statutory Revision Commissioners then in office were Charles Z. Lincoln, William H. Johnson and A. Judd Northrup. The Commissioners were appointed pursuant to L. 1895, ch. 1036.

the further ground that it made it necessary to look in several places to find the general provisions governing practice.

It was opposed by the New York State Bar Association and by the Association of the Bar of the City of New York, and was picturesquely characterized as an attempt to kill thistles by changing fence lines.

PLAN OF CODE REVISION OF THE STATE BAR ASSOCIATION

The State Bar Association met this plan of the Statutory Rivision Commission by proposing,

> "A short practice act covering jurisdictional matters, leaving the details of practice to be controlled by rules of Court somewhat like the plan now in operation in England."

One of the objections urged against this plan was that it violated a fundamental principle of our government, namely, the separation of the legislative and judicial departments.

This objection is well stated in the language of Mr. David Dudley Field:

> "There are certain propositions that have become maxims of government, one of which is that the legislative and judicial departments should be kept distinct, or, in other words, that the same person should not be both the lawgiver and judge. There is no need of arguing about it. The maxim is founded on philosophy and experience. It has taken ages of struggle to establish it. And here it is. We profess to take it for absolute truth; we talk of it as one of the fundamental doctrines of modern government; we write it at the head of our Constitutions; but we violate it every hour that we allow the judges to participate in the making of the laws."

An examination of the acts and rules of England show that together they constitute quite as large a body of regulations governing practice as do the provisions in our own code relating to procedure.[7]

PLAN OF CODE REVISION OF THE COMMITTEE ON LAW REFORM OF THE STATE BAR ASSOCIATION

The State Bar Association in 1898 adopted a resolution authorizing its Committee on Law Reform to secure if possible the enactment by the legislature of a suitable bill relative to code revision, and in case of its failure to secure the passage of such a bill, to appoint five of the members of

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[7]The Statutory Revision Commission prepared a table which appears in the preliminary note to its proposed Code of Civil Procedure dated January, 1900, showing approximately the number of sections in the English practice acts and rules:

Subject.	No. of sections.
Judicature acts 1873-1894	246
Juries, acts 1825, 1862, 1870	76
Justices of the Peace, summary jurisdiction	101
Landlord and tenant; distress for rent acts, etc	98
Limitations of actions	52
Bankruptcy	178
Corporation actions	85
Redemption and foreclosure of mortgages	4
Declaration of title to real estate	49
County Court Act, 1888, and rules	233
Judgment debtors; arrest	29
Evidence and witnesses	76
Executors and administrators; probate, etc	280
Guardianship	27
Inferior Courts; jurisdiction	20
Judgments and executions	59
Lunacy, judicial inquisitions	60
Matrimonial causes	130
Partition	19
Solicitors, admission to practice, etc	28
Trustees Act, 1893	22
Solicitor's remuneration	55
Acts of 1895, mortgages, legal costs act	4
Acts of 1896, vexatious actions act; judicial trustees acts	8
Rules adopted by the Supreme Court, 1895	43
Supreme Court Rules, 1883	1,045
Workmen's Compensation Act, 1897	16
Rules adopted thereunder	67
	3,310

the association "to draft rules and statutes regulating civil practice and report the same to this association at its next annual meeting." [8]

The committee did not succeed in securing the necessary legislation, and entered upon the work of preparing the proposed revision of the code. It did considerable work, and its report contains many valuable suggestions. Its plan of revision is based upon the enactment of a judiciary law "which shall treat of Courts and judicial officers, of the jurisdiction and limitations of the jurisdiction of the different Courts of Record, and of the more substantial matters relating to appeals, parties, process and the like," leaving "all details of practice from the time the action or proceeding is commenced until final judgment and its satisfaction" to be regulated by rules of court somewhat like the method in vogue in England.

The detailed plan of the committee may be summarized as follows:

> "1. The enactment of a 'Judiciary Law' which shall treat of the organization of the Courts, of the powers and duties of Courts and judicial officers, of the jurisdiction and limitations of the jurisdiction of the different Courts of Record, and of the more substantial matters relating to appeals, parties, process and the like.
>
> "2. The enactment of an 'Administrative Law' containing all the provisions relative to administration as to clerks, reporters, sheriffs, coroners, stenographers, drawing of jurors and the like.
>
> "3. Eliminate the provisions of substantive law from the Code, where they do not properly belong, and where they were placed by the Commissioners without apparent reason.

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[8] The members of this Committee were J. Newton Fiero, Chairman; Elbridge L. Adams, Secretary; Charles E. Hughes, Adelbert Moot and James Eaton.

"4. Place in the Penal Code all matters providing for penalties, or defining misdemeanors.

"5. All details of practice from the time an action or proceeding is commenced until final judgment and its satisfaction, should be regulated by rules of Court, which should be simple, elastic, easily administered, and as concise as is consistent with a complete system of procedure." [9]

PLAN OF CODE REVISION OF THE JOINT COMMITTEE OF THE LEGISLATURE OF 1900

The Joint Committee of the Legislature of 1900 adopted a course between the two extremes of the Statutory Revision Commission and the State Bar Association and suggested a third plan for code revision, consisting of eliminating from the code all provisions not relating directly to practice, making obviously necessary changes in pleading and practice, and reducing the general practice provisions to a single brief legislative practice act.[10]

The plan, stated in the language of the committee, is as follows:

"*A. To eliminate from the code all matters not relating directly to practice and the assignment of the material so removed to a place in the general laws.*[11]

"*B. To make such obviously necessary changes in pleading and practice as may be agreed upon by the authority making the revision after conference with the bench and bar.*

"*C. To reduce the general practice provisions to a single brief legislative act.*"[12]

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[9]Report of Committee on Law Reform on Code Revision, 1899, pp. 27-31.

[10]The members of this Committe were Edgar T. Brackett, George R. Malby, Thomas F. Grady, representing the Senate, and Adolph J. Rodenbeck, Edward H. Fallows, James T. Rogers, Joseph I. Green and N. Taylor Phillips, representing the Assembly.

[11]Since the report of the joint committee the "Consolidated Laws" have taken the place of the "General Laws."

[12]Report of the Joint Committee on Statutory Revision Commission Bills, 1901, p. 20.

This plan differed from the plan of the Statutory Revision Commission in that it proposed a single practice act and advocated such changes in pleading and practice as were obviously necessary.

It differed from the plan of the State Bar Association in that it proposed a single practice act which should be enacted by the legislature and which should contain all the general practice provisions.

PLAN OF CODE REVISION OF THE COMMISSION ON THE LAW'S DELAYS

The Commission on the Law's Delays made certain recommendations which may be summarized as follows: [13]

1. Constitutional amendment providing that the legislature may increase the number of justices of the Supreme Court according to population.

2. Constitutional amendment permitting the legislature to increase the number of justices of the Supreme Court from time to time as it shall see fit, and of the Court of Appeals to the extent that the membership of the latter shall not exceed eleven judges.

3. Constitutional amendment permitting appeals to be taken directly from a final judgment in an action or final order in a special proceeding at trial or special term, when such appeals involve only questions of law, directly to the Court of Appeals.

4. Appointment of supreme court commissioners in counties of the State having a population of upwards of 500,000.

5. Adoption of the summons for directions prevailing in the High Court of Justice in England, whereby the plaintiff in an action shall be required and

[13] Report of the Commission on Law's Delays, 1904, pp. 59 *et seq.*

authorized to bring the defendant before the court upon a motion after issue joined for reference to a Supreme Court Commissioner to determine the preliminary relief and all the preliminary relief required by both parties to prepare for trial.

6. Adoption of practice relating to summary judgment prevailing in the High Court of Justice in England so as to provide that in all actions to recover a sum of money certain or upon liquidated claims for the rent of land, in which the plaintiff has reason to believe that the defense interposed is sham, he may move upon affidavits for reference by the court to a master to examine into the defense alleged to be sham.

7. Classify all cases on the jury calendars for the purpose of trial so that there shall be a separate calendar for tort cases and a separate calendar for contract cases.

8. Diversion of small business from the Supreme Court into the City Court.

9. Appointment of commissioners to assess the value of real property condemned for public or quasi-public uses by the courts from among the Supreme Court Commissioners.

10. Keeping and publishing judicial statistics.

11. Prohibiting the payment of any sum of money by a person who is a candidate or shall become a candidate for a judicial office.

PLAN OF CODE REVISION OF THE COMMITTEE OF FIFTEEN

The Committee of Fifteen, of 1903, appointed pursuant to an act of the legislature, recommended substantially the same plan as that of the legislative committee of 1900 in these words: [14]

> "These considerations bring up the question as to whether the remedy is by the enactment of a statute

[14] The members of this Committee were Alton B. Parker, Celora E. Martin, Charles Andrews, William H. Adams, John G. Milburn, J. Newton Fiero, Frank H. Platt, Abraham Gruber, William B. Hornblower, Frank Hiscock, Judson S. Landon, Samuel T. Maddox, John C. Davies, Alonzo Wheeler, Robert Earl.

which shall accomplish the objects sought to be brought about upon the same lines as the present code, or whether we should adopt the system in use in England since the Judiciary Act of 1873, by which the general features of the practice are provided for by statute, and the details relegated to rules of court under the control and supervision of the Judges.

"Upon this point there is a difference of opinion among judges and lawyers. The principal reasons urged for the adoption of a short practice act and set of rules are, that this practice has been successful not only in England, but in some of our own states, including Massachusetts, and notably Connecticut, where a practice act supplemented by rules has satisfactorily solved the difficult problem.

"A very forceful argument advanced on behalf of rules rather than legislation in connection with the practice is, that rules will be less liable to interference by legislative action; and by reference to the numerous changes in the Code of Procedure since its enactment, a great force is given to the statement that we can have no stability as to the practice except by a system of rules under control of the court, rather than a statute enacted by the legislature.

"On the other hand, it is urged that this change would be too radical a departure from that which was adopted in 1848 by the enactment of the 'Code of Procedure,' and that it would be a step backward. Moreover, that it is not practicable since it is at least doubtful whether the legislature would be willing to place this matter in the hands of the court after the present system has been in operation for more than fifty years.

"Another objection lies in the fact that it is exceedingly difficult and troublesome to lay down a dividing line which shall scientifically determine as to what matters of practice should be enacted by the Legislature, and what matters should be exclusively under the control of the Court, and that if such a course were adopted it would result in a lawyer or judge being

obliged to examine both code and rules in order to determine what action should be taken in a specific case.

"As to the necessity for some action as to the code, there seems to be little or no question; as to the nature, character and extent of the change there is a difference of opinion, and the main question before the committee seems to be whether there shall be simply a condensation and simplification of the code, eliminating unnecessary and objectionable features, or whether we shall follow other jurisdictions by enacting a short practice act supplemented by rules of court.

"In view of this conflict of opinion we incline to recommend a middle ground embodying many of the best features of both the proposed plans, by which the practice shall remain substantially unchanged, but relieved of its most burdensome technicalities, and the dual system of legislative act and rules, to which we are accustomed, be continued, leaving many of the minor matters to the courts, as is now contemplated by the rules, enacting the more important matters of practice in a statute. This appears feasible, as some discretion must, in any event, be left to the court in framing rules of practice."

The Committee made the following recommendations:

"First. Eliminate all substantive law, including provisions for penalties, and the rules of evidence other than those relating to procedure to take and perpetuate evidence.

"Second. Leave the practice in inferior courts to be fixed either in the statutes relating to those courts or by a separate statute.

"Third. Enact in a separate statute all that is purely administrative, such as law relating to duties of sheriffs, coroners, stenographers, clerks, reporters, drawing of jurors and the like.

"Fourth. Omit matters obsolete by lapse of time, and revise those manifestly not adapted to present conditions.

"Fifth. Simplify the language, state in general terms matter covering related topics, condense the sections where it can be done without danger of raising questions of construction, and in cases where the construction is doubtful, make it clear by restatement.

"Sixth. Place in the rules minor matters which should be discretionary, and which are analogous to the matters now contained in the rules, so far as they now bear that character." [15]

PLAN OF CODE REVISION OF THE SPECIAL COMMITTEE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK ON SIMPLIFICATION OF PROCEDURE

The Special Committee of the Association of the Bar of the City of New York to consider the simplification of the procedure in the courts of the state was appointed March 9, 1909, and since that time has made numerous and valuable suggestions as to amendments to the Code of Civil Procedure designed to simplify the practice and obviate delay in the administration of justice.[16]

A report of the proposed amendments to the Code of Civil Procedure, the Code of Criminal Procedure, and the Court Rules, containing fifty-two recommendations, was

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[15]Report of the Committee of Fifteen, 1903, pp. 25-27.

[16]The members of this Committee are Cipriano Andrade, Jr., Chairman, 527 Fifth Ave., N. Y. City; James W. Hawes, Charles H. Beckett, Lawrence Godkin, Joseph M. Proskauer and Charles H. Young; Henry A. Forster, Secretary, 76 William St., N. Y. City. Report of Commitee dated November 1, 1909.

submitted to various members of the bench and bar, and at the session of the legislature of 1910 the committee submitted for adoption by the legislature twenty-three bills endorsed by the Association of the Bar of the City of New York.[17] Nine of the forty-three recommendations of the committee became statutes of the state, one was substantially adopted, and four were partially adopted.

WORK OF THE BOARD OF STATUTORY CONSOLIDATION ON THE PRACTICE IN THE COURTS

The Board of Statutory Consolidation under the statute creating it was authorized to revise the practice in the courts, but, as already stated, the board did not have sufficient time within the period allowed in the statute for doing the work, to consolidate the general substantive statutes as well as to revise the practice, and therefore deferred action upon the two codes of practice.

The board did not reach the conclusion to postpone the revision of the practice in the courts until after a thorough study of the subject and after the preparation of a rearrangement of the Code of Civil Procedure under a new analysis made according to the steps in the progress of an ordinary action in the courts.

In making this preliminary study all of the substantive matter in the Code of Civil Procedure was examined and after due consideration it was decided to leave the revision of the Code of Civil Procedure and the Code of Criminal Procedure for future action, but to eliminate such substantive matter as clearly had no place in a code of practice. This material will be found distributed in nineteen of the

[17]Report of Committee dated October 3, 1910.

Consolidated Laws, but a great part of it has been placed in the new Consolidated Law known as the Judiciary Law.[18]

CONFERENCE OF JUSTICES OF THE SUPREME COURT ON CODE REVISION

Concerted action on the part not only of the bar represented in the bar associations but also on the part of the judiciary would do much to bring about the needed reform in the practice in the courts and to secure a proper revision. The bar associations have been active upon this subject for some time, but not until the year 1910 was a conference of justices of the Supreme Court called for the purpose of hastening the reform in procedure.

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[18]The number of sections or parts of sections removed from the Code of Civil Procedure by the Board of Statutory Consolidation will appear from the following table:

Consolidated Law.	Sections.	Parts of Sections
Banking Law	0	2
Civil Rights Law	9	1
Code of Criminal Procedure	0	1
County Law	15	11
Debtor and Creditor Law	6	0
Decedent Estate Law	11	3
Domestic Relations Law	2	2
Executive Law	2	7
General Business Law	1	0
General Corporation Law	55	9
Joint Stock Association Law	1	1
Judiciary Law	254	30
Lien Law	50	0
Military Law	1	0
Penal Law	31	1
Personal Property Law	3	0
Prison Law	32	1
Public Officers Law	6	2
State Finance Law	1	5
	479	76

The points that were to be taken up by the convention, as announced in the press, were as follows:

> "Co-operation between the court and the bar, in order to secure the quickest possible disposition of cases.
>
> "An intelligent presentation to the legislature of amendments to the law so that there shall be fewer loosely-drawn statutes for the courts to interpret.
>
> "Abolition of double appeals and demurrers, and a general plan for speedy adjudication of disputes in the lower courts, so the Court of Appeals may be intrusted for the most part with constitutional and capital cases.
>
> "Relief of the calendar and a reduction in the expenses of litigants."

PLAN HEREIN SUGGESTED FOR THE TREATMENT OF THE CODE OF CIVIL PROCEDURE

The same general plan adopted by the Board of Statutory Consolidation for the treatment of the statutes as a whole applies to the disposition of the Code of Civil Procedure.

The Code of Civil Procedure may be treated, therefore, under the following heads:

(1.) Classification
(2.) Consolidation
(3.) Revision

CLASSIFICATION OF THE CODE OF CIVIL PROCEDURE

The classification of the Code of Civil Procedure involves: First, the elimination of extraneous material since the substantive provisions and practice provisions cannot be arranged under the same analysis; second, the classification of the practice provisions remaining so that the heads will not overlap and so that each subject will be

complete in itself; and, third, the distribution of the practice provisions according to the proposed analysis.

ELIMINATION FROM THE CODE OF CIVIL PROCEDURE OF SUBSTANTIVE PROVISIONS AS A PRELIMINARY TO CLASSIFICATION

Much of this work of elimination has been done by the Board of Statutory Consolidation, which has removed from the Code of Civil Procedure more than 500 sections or parts of sections of a substantive character.

With reference to the necessity for the elimination of this material there can be no question. Substantive provisions have no place in a practice act. The necessity for their exclusion will be assumed.

One of the members of the Board of Statutory Consolidation, in an address before the New York State Bar Association, said: "The portions of the code which deal with substantive law should be eliminated from the code and placed in those portions of the statutory law where they properly belong."

The Committee on Law Reform of the State Bar Association, in an excellent report, recommends the elimination of "the provisions of substantive law from the code where they do not properly belong and where they were placed by the commissioners without apparent reason."

There still remains, however, in the code, matter of a substantive character which the board thought could better be taken care of when the revision of the code was undertaken. Some of these provisions are to be found in articles which treat of special actions which it was deemed wise not to disrupt until a complete revision of the practice was made.

In addition to this substantive matter there are provisions in the code relating to special city courts, the practice in which is distinctive and is limited in use to a restricted territory. The provisions relating to these courts might perhaps be conveniently removed to a special statute or to the respective charters of the cities to which they are confined.

CLASSIFICATION OF THE PRACTICE AFTER THE ELIMINATION OF EXTRANEOUS PROVISIONS FROM THE CODE OF CIVIL PROCEDURE

After extraneous matter has been removed from the Code of Civil Procedure the material that is left must be arranged according to some analysis. The present code has no analysis. The English rules of practice are merely thrown together. If the practice is made elastic, consistent and comprehensive, and is confined to general practice, there is no reason why the material cannot be arranged according to some logical plan.

The principle of analysis which the present arrangement of the code chiefly offends is that "divisions, while together covering the whole, should not overlap."

The present arrangement of the Code of Civil Procedure obviously cannot be followed in preparing an analysis for a new practice act. It contains such a mass of miscellaneous material and the matter in the sections is frequently so diverse that it is impossible, without dividing the sections, to give the material now in the code any consistent or logical arrangement.

It was evidently the design of the framers of the code to have certain general provisions relating to actions and proceedings, and special provisions relating to particular actions and courts. This arrangement makes it impossible to bring together the material on a particular subject and makes it

necessary to look in more than one place for the practice on any topic.

There are a number of provisions grouped under the unsatisfactory head of "Miscellaneous," and when this term seemed too restrictive the compilers adopted the comprehensive expression, "Other Matters."

While there are chapters on special proceedings, there are also scattered through the code, provisions which are made applicable to special proceedings by express reference and sometimes without reference.

There are chapters on the surrogate's court and the justice's court, but they are by no means complete. The chapter on the justice's court is but a meager outline of the practice in that court, as there are provisions throughout the code that are applicable to the practice in that court.

There are special provisions relating to particular actions, but they furnish but a skeleton of the proceedings in those actions, for there are numerous provisions in other parts of the code relating to those actions.

There is a special article of eight sections relating to an action for a fine, penalty or forfeiture or upon a forfeited recognizance, but the article does not embrace by any means all of the provisions relating to such an action. The general provisions relating to all actions are applicable to the action covered by the special article, and one of the sections of the special article makes applicable two sections in another article relating to a special subject.

There is a special article of thirty sections relating to an action for dower, but the general provisions relating to all actions apply, and one of the sections of the special article makes applicable the provisions of another article relating to another subject.

There are special provisions regulating actions relating to property and provisions applicable to two or more of such actions, but the article containing the provisions applicable to two or more actions makes applicable other special sections of the code, as, for instance, the section which provides that "any action specified in this title may be maintained by or against an infant in his own name; and article fourth of title second of chapter fifth of this act applies to such an action, except as otherwise prescribed in sections 1535 and 1536 of this act." This makes the confusion "worse confounded."

These and many other difficulties in the arrangement of the Code of Civil Procedure arise from the effort to separate the practice in particular actions from that which applies generally.

As long as a clear line of demarcation cannot be drawn between those provisions that are general and those that are special to actions so that they may be segregated and made complete, some other method of classification should be adopted which will obviate the necessity of looking in so many places for the practice on any one subject.

The want of logical arrangement of the Code of Civil Procedure and of other practice acts, for that matter, is revealed by a glance at the headings of the chapters and rules indicating their contents.

ARRANGEMENT OF THE CODE OF CIVIL PROCEDURE

The arrangement of the material in the Code of Civil Procedure is as follows:

Chapter	Subject.
1.	General provisions, relating to courts, and the members and officers thereof.

Chapter. Subject.

2. Powers, duties, and liabilities of a sheriff, or other ministerial officer, in the execution of the process, or other mandate of a court or judge, in a civil case.
3. Civil jurisdiction of the principal courts of record; organization, members and officers thereof; distribution and dispatch of business therein.
4. Limitation of the time of enforcing a civil remedy.
5. Commencement of and parties to an action.
6. Pleadings in courts of record, including counterclaims.
7. General provisional remedies in an action.
8. Miscellaneous interlocutory proceedings and regulations of practice.
9. Evidence.
10. Trials, including jurors and juries.
11. Judgments.
12. Appeals.
13. Executions.
14. Special provisions regulating actions relating to property.
15. Special provisions, regulating other particular actions and rights of action, and actions by or against particular parties.
16. Actions in behalf of the people, and special proceedings instituted, in their behalf, by state writ.
17. Certain special proceedings instituted without writ.
18. Surrogates' courts and proceedings therein.
19. Courts of justices of the peace, and proceedings therein.
20. Provisions relating to certain courts in cities, and the proceedings therein.
21. Costs and fees.
22. Definitions and regulations concerning the construction, effect and applications of this act.
23. Supplemental provisions.

ARRANGEMENT OF THE PROPOSED CODE OF CIVIL PROCEDURE OF THE STATUTORY REVISION COMMISSION

The arrangement of the Code of Civil Procedure proposed by the Statutory Revision Commission is as follows: [19]

Chapter	Subject.
1.	General provisions.
2.	Commencement of action.
3.	Parties.
4.	Pleadings.
5.	Arrest.
6.	Injunction.
7.	Attachment.
8.	Receivers; appointment, qualification and general powers.
9.	Receivers of insolvent corporations.
10.	Depositions.
11.	Trials generally.
12.	Trial by jury.
13.	Struck jury.
14.	Judgments in actions.
15.	Judgments without process.
16.	Execution generally.
17.	Execution against personal property.
18.	Execution against real property.
19.	Execution against the person.
20.	Appeals generally.
21.	Appeals to Court of Appeals.
22.	Appeals to Appellate Division.
23.	Replevin.
24.	Ejectment.
25.	Partition.
26.	Dower.
27.	Foreclosure of mortgage by action.
28.	Foreclosure by advertisement.

[19] Report of the Commissioners of Statutory Revision, 1900, Vol. 1.

Chapter. Subject.

29. Determination of claims to real property.
30. Waste; nuisance; other real actions.
31. General provisions relative to real actions.
32. Decedents' estates.
33. People's actions.
34. Judgment creditors' actions.
35. Miscellaneous special actions.
36. Corporation actions and proceedings.
37. Matrimonial actions.
38. State writs.
39. Habeas corpus.
40. Mandamus.
41. Prohibition; assessment of damages.
42. Certiorari.
43. Committee of incompetent person.
44. Disposition of real property of minors and incompetent persons.
45. Arbitrations.
46. Discharging mortgages of record.
47. Life tenants.
48. Change of name.
49. Supplementary proceedings.
50. Time; service of papers.
51. Discovery of books and papers.
52. Abatement.
53. Motions and orders.
54. Bonds and undertakings.
55. Mistakes and irregularities.
56. Tender; payment into court.
57. Contempts; fines.
58. Costs and fees.
59. Miscellaneous provisions.
60. Effect of Code; laws repealed.

ARRANGEMENT OF THE ENGLISH PRACTICE RULES

The arrangement of the rules of practice of the supreme court of England is as follows:[20]

Order — Subject

1. Form and commencement of action.
2. Writ of summons and procedure.
3. Indorsements of claim.
4. Indorsements of address.
5. Issue of writ of summons.
    1. Place of issue.
    2. Assignment of causes.
    3. Generally.
    4. In particular actions.
6. Concurrent writs.
7. Disclosure by solicitors and plaintiffs.
    1. Stay of proceedings.
    2. Change of solicitors.
8. Renewal of writ.
9. Service of writ of summons.
    1. Mode of service.
    2. On particular defendants.
    3. On parties and other bodies.
    4. In particular actions.
    5. General.
10. Substituted service.
11. Service out of jurisdiction.
12. Appearance.
13. Default of appearance.
14. Leave to define judgment and defend where writ specially indorsed.
15. Application for an account.
16. Parties.
    1. Generally.
    2. Partners.
    3. Persons under disability.
    4. Proceedings by or against paupers.
    5. Administration and execution of trustees.
    6. Third party procedure.

[20] Annual Practice of the Supreme Court for 1911, Vol. 1, p. XIII.

Order. Subject.

17. Change of parties by death, etc.
18. Joinder of causes of action.
18-a. Trial without pleading.
19. Pleading generally.
20. Statement of claim.
21. Defense and counter-claim.
22. Payment into and out of Court and tender.
23. Reply and subsequent proceedings.
24. Motions arising pending the action.
25. Proceedings in lieu of a demurrer.
26. Discontinuance.
27. Default of pleading.
28. Amendment.
29. Releases in admiralty actions.
30. Summons for directions.
31. Discovery and inspection.
32. Admissions.
33. Issues, inquiries and accounts.
34. Special cases.
    1. Form of special cases.
    2. Issues of fact without pleadings.
35. Proceedings in district registry.
36. Trial.
    1. Place.
    2. Mode of trial.
    3. Notice and entry of trial.
    4. Entry in district registry.
    5. Lists for London and Middlesex.
    6. Papers for judge.
    7. Proceedings at trial.
    8. Assessors, commissioners and referees.
    9. Writ of inquiry and reference as to damages.
37. Evidence general.
    1. Form.
    2. Examination of witnesses.
    3. Subpœnas.
    4. Perpetuating testimony.
    5. Examiners of the court.
    6. Obtaining evidence for foreign tribunals.

Order. Subject.

38. Affidavits and depositions.
    1. Form.
    2. Affidavits and evidence in chambers.
    3. Trial on affidavit.
39. Motion for new trial.
40. Motion for judgment.
41. Entry of judgment.
42. Execution.
43. Writs of fieri facias elegit and sequestration.
44. Attachment.
45. Attachment of debts.
46. Charging orders, distringas, and stop orders.
47. Writ of possession.
48. Writ of delivery.
48-a. Actions by and against firms.
49. Transfers and consolidations.
50. Interlocutory orders as to mandamus, injunctions, etc.
    1. Grounds.
    2. Receivers.
    3. Liquidators.
51. Sales by the Court.
    1. In the chancery division.
    2. Conveyancing counsel.
52. Motions and other applications.
53. Action of mandamus.
54. Applications and proceedings at chambers.
    1. General.
    2. Queen's bench and probate, divorce and admiralty divisions.
54-a. Jurisdiction of written instruments.
54-b. Proceedings under Trustee Act, 1893.
54-c. Life Assurance Companies' Act, 1896.
55. Chambers in the chancery division.
    1. General.
    2. Administrators and trust companies, foreclosure and redemption.
    3. Powers and duties of chief clerk.
    4. Assistance of experts.

Order. Subject.

5. Summons in chambers.
6. Proceedings relating to infants.
7. Documents to be left at chambers.
8. Summons to proceed.
9. Summons book.
10. Attendants.
11. Advertisements for creditors and claimants.
12. Interest.
13. Certificates of the chief clerk.
14. Further consideration.
15. Registering and drawing up of orders in chambers.

56. Reference in admiralty actions.
57. Interpleader.
58. Appeals to the Court of Appeals.
59. Divisional courts.
60. Officers.
61. Central office.
62. Registrars of the chancery division.
63. Sittings and vacations.
64. Time.
65. Costs.
66. Notices, printing papers, copies, office copies, minutes.
67. Service of orders.
    1. General.
    2. Admiralty actions.
68. Application of rules in crown revenue and matrimonial cases.
69. Arrest of defendant under section 6 of the Debtors' Act, 1869.
70. Effect of non-compliance.
71. Interpretation of terms.
72. General rules.

ANALYSIS OF THE CIVIL PRACTICE HEREIN PROPOSED

The arrangement of the present Code of Civil Procedure has been condemned in unlimited terms. Its arrangement

could not be followed in a new civil practice act without such a course being open to just criticism. The fault is fundamental, based upon the attempt to classify material that will not classify satisfactorily or even conveniently. Some basis must be adopted which will appeal to the mind as consistent and which will be broad enough to take in all the practice provisions in an action. At the same time a purely scientific or philosophical arrangement must be avoided. It is a question of expediency. The problem is the adoption of an arrangement which will be more convenient than that in the present code and which will appeal to the profession as having some claim to a consistent and analytical basis.

The State can perform an inestimable service to jurisprudence by promulgating a uniform analysis for the distribution of the ordinary practice in the courts. "Order is Heaven's first law," says Pope. If a standard and official classification were made the profession would soon learn without the aid of an index where a particular provision could be found.

GENERAL CLASSIFICATION OF THE CIVIL PRACTICE HEREIN PROPOSED

The classification proposed herein arranges the practice provisions according to the steps in an action under the following general heads:

1. *General Provisions.*
2. *Commencement.*
3. *Trial.*
4. *Judgment.*
5. *Review.*
6. *Satisfaction.*

Under this arrangement and under each sub-head the practitioner will find the material that relates to its appropriate head and will find it there and nowhere else.

He will not find under the head of commencement, matter relating to the satisfaction of a judgment, nor under the head of review, provisions relating to the trial of his case.

The same idea that was followed in the general classification of the practice provisions dominated the detailed classification of the various matters under each title, namely, to secure divisions which would cover the whole subject and which would not overlap.

Under each sub-head the practitioner will find all of the provisions relating to the topic whether of a general or special nature.

If he desires for instance to frame a complaint in an action, whether a general action or a so-called special action, he will find what he needs under the head of complaint, and so throughout the analysis.

When he has placed his finger upon any head or sub-head in any title it is intended that he shall find all the matter in the practice act relating to that subject.

This satisfies the principle of a scientific arrangement and also meets the practical consideration of a convenient arrangement. It is analytically correct because the parts or divisions are homogeneous and bear a definite relation to each other and it satisfies the sense of convenience as it brings together all of the provisions relating to a particular subject without overlapping.

With such an arrangement it will not be necessary for the practitioner to grope through the provisions in the code relating to actions generally and those relating to particular actions to be sure that he has all the matter in the code relating to a particular branch of his case and to reinforce

this search by an examination of indexes in and out of the code. Under this arrangement he will not find in the same section a provision relating to the issuance of a summons and the issuance of an execution. Each will be found under its appropriate head.

What a practitioner needs is an arrangement of the practice which will enable him to commence his litigation without a study of half of the provisions of the code. What he wants to know in the beginning of his suit is not how to collect the judgment but who are necessary and proper parties and how to issue the summons and draw his complaint, and he is entitled to have all of these provisions in one place so that he may not be tripped up in case he has not had the time to make a page to page examination of the code. He is entitled to have these provisions in one place whether his action is on a promissory note or upon some matter that requires special regulation.

Under the proposed arrangement the inexperienced practitioner can commence any suit that may be brought to him by the examination of the first two titles and be sure that he will not be embarrassed or perhaps defeated because he has failed to observe some special provision tucked away in an obscure corner of the code.

After the practitioner has begun his suit and prepared it for trial he will find under the third title all the practice necessary to try his cause.

When he has secured a judgment he will find under the next title all the practice relating to his judgment.

After the entry of his judgment, in case of an appeal or motion for new trial, he will find the practice on that subject in the fifth title.

Finally, under the concluding title, he will find provisions relating to the satisfaction of his judgment.

Under the proposed arrangement the practitioner need not acquaint himself with the provisions in the code faster than he proceeds with his action.

DETAILED CLASSIFICATION OF THE CIVIL PRACTICE HEREIN PROPOSED

The following detailed classification of the civil practice was made in connection with the examination of the Code of Civil Procedure under the Board of Statutory Consolidation for provisions of a substantive character.

When the Board of Statutory Consolidation decided to incorporate into the Consolidated Laws substantive provisions from the Code of Civil Procedure, it became necessary to read the code line by line for that purpose since many of the substantive provisions were to be found in the middle of sections relating to practice. While this examination was being made it was deemed wise to classify the material as the examination proceeded. As a result of this study the following detailed analysis of the civil practice was made and the provisions of the code relating to practice in actions in the supreme court were distributed according to this classification and printed in a separate volume.

The classification was made for the purpose of bringing together related provisions as a preparation for the revision of the practice and also as evidence that the distribution of purely practice matter could be made according to an orderly and logical analysis.

Some improvement might be made to this analysis, but it has been thought best to submit it in this paper just as it was prepared as an object lesson and as a working model in the classification of civil practice and not as an ideal analysis.

CIVIL PRACTICE

(References are to sections in the "Civil Practice Law," prepared for the Board of Statutory Consolidation)

TITLE I

General Provisions

I. *Name,* § 1.
II. *Motions,* §§ 2–4.
III. *Orders,* §§ 5–10.
IV. *Abatement,* §§ 11–15.
V. *Removal,* §§ 16–18.
VI. *Severance,* §§ 19–22.
VII. *Consolidations,* § 23.
VIII. *Compromise,* § 24.
IX. *Restitution,* §§ 25, 26.
X. *Security,* §§ 27–37.
XI. *Stipulation,* § 38.
XII. *Extension,* §§ 39, 40.
XIII. *Defects,* §§ 41, 42.
XIV. *Publication,* §§ 43–45.
XV. *Stay,* §§ 46, 47.
XVI. *Papers,* § 48.
XVII. *Amendment,* §§ 49–52.
XVIII. *Failure to Prosecute,* §§ 53, 54.
XIX. *Provisional Remedies,* §§ 55–60.
XX. *Attachment,* §§ 61–122.
XXI. *Injunction,* §§ 123–159.
XXII. *Arrest,* §§ 160–210.
XXIII. *Replevin,* §§ 211–234.
XXIV. *Receiver,* §§ 235–245.
XXV. *Dower,* §§ 246–248.

Title 3 — *Continued:*
Trial — *Continued:*

(1) *General,* §§ 691–699.
(2) *Appointment,* § 700.
(3) *Oath,* § 701.
(4) *Trial,* §§ 702–705.
(5) *Report,* §§ 706–718.
(6) *Request,* § 719.

3. *Trial by Jury,* §§ 720–776.

(1) *General,* §§ 720–725.
(2) *Right,* §§ 726–735.
a. *Of Course,* §§ 726–730.
b. *By Order,* §§ 731–734.
c. *Waiver,* § 735.

(3) *Formation,* §§ 736–757.
a. *Ordinary,* §§ 736–744.
b. *Struck,* §§ 745–749.
c. *Foreign,* § 750.
d. *Challenges,* §§ 751–757.

(4) *Trial,* §§ 758–761.
(5) *Verdict,* §§ 762–775.
(6) *Discharge,* § 776.

4. *Inquests,* § 777.
5. *Submissions,* §§ 778–780.
6. *Evidence,* §§ 781–898.

(1) *General Provisions,* §§ 781–833.
a. *Presumption,* §§ 781–800.
b. *Witnesses,* §§ 801–820.
c. *Particular Cases,* §§ 821–832.
d. *Proviso,* § 833.

TITLE 4

Judgment

Title 4 — *Continued:*

Judgment — *Continued:*

(a) *Partition,* §§ 929–938.
(b) *Waste,* § 939.
(c) *Dower,* §§ 940–944.
(d) *Matrimonial Actions,* § 945.
(e) *Corporations,* § 946.

(2) *Intermediate Proceedings,* §§ 947–965.

a. *Partition,* §§ 947–958.
b. *Dower,* §§ 959–965.

(3) *Final,* §§ 966–1036.

a. *General,* §§ 966–971.
b. *Special,* §§ 972–1036.

(a) *Real Actions,* §§ 972–997.

A. *General,* § 972.
B. *Partition,* §§ 973–979.
C. *Ejectment,* §§ 980–982.
D. *Dower,* §§ 983–985.
E. *Foreclosure,* §§ 986–989.
F. *Claim to Real Property,* §§ 990–993.
G. *Waste,* §§ 994–996.
H. *Nuisance,* § 997.

(b) *Matrimonial Action,* §§ 998–1006.

A. *General,* §§ 998–1001.
B. *Annulling Marriage,* §§ 1002–1004.
C. *Divorce,* § 1005.
D. *Separation* § 1006.

Title 6 — *Continued:*

Satisfaction — *Continued:*

(2) *Person,* §§ 1412–1416.

(3) *Property,* § 1417–1446.

a. *Actions Generally,* §§ 1417–1431.

b. *Actions Particularly,* §§ 1432–1446.

2. *Requisites,* §§ 1447–1461.
3. *Lien,* §§ 1462, 1463.
4. *Levy,* §§ 1464–1474.
5. *Preference,* §§ 1475–1477.
6. *Claim to Property,* §§ 1478–1481.
7. *Sale,* §§ 1482–1503.

(1) *General,* §§ 1482–1484.

(2) *Real Property,* §§ 1485–1500.

(3) *Personal Porperty,* §§ 1501–1503.

8. *Redemption,* §§ 1504–1508.
9. *Waste Pending Redemption,* §§ 1509–1512.
10. *Discharge,* § 1513.
11. *Return,* § 1514.

III. Without Execution, §§ 1515–1530.

1. *Payment into Court,* §§ 1515–1517.
2. *Payment out of Court,* §§ 1518–1520.
3. *Distribution,* §§ 1521–1528.
4. *Investment,* § 1529, 1530.

CONSOLIDATION OF THE PRACTICE AFTER ITS DISTRIBUTION UNDER THE PROPOSED ANALYSIS

No revision of the practice can be accomplished without bringing together the provisions on the same subject. They are now scattered throughout the Code of Civil Procedure. A glance at the index of the code will show how widely separated are related topics. No single subject is found

in one place. There are general provisions and special provisions, actions and proceedings, courts of record and courts not of record, all intertwined requiring great skill in many instances to unravel. The surrogate's practice is not complete by itself. The justice's practice is in the same condition. Provisions under the head of actions apply to special actions and special proceedings and so on to interminable confusion. Even after substantive provisions have been removed the same perplexity remains. There is only one way out of the difficulty; the practice provisions in the code must be classified so that each subject will be complete in itself, making it unnecessary to look in more than one place for a given step in an action. When this has been accomplished successfully related provisions will have been brought together and the practice will then be ready for consolidation. When related provisions gathered from the various sources have been collated consolidation steps in and welds the matter into a consistent whole. It avoids duplication and avoids useless matter but preserves the text, making only such changes as may be necessary to combine provisions. It does not necessarily involve a change in the substance of the practice.

In performing this part of the work a careful examination should be made of all decisions construing provisions in which any change in language or place is made so that the full scope of the provisions and the effect of any change may be understood and described in a note. The references to the sources of the provisions should also appear so that their origin may be readily traced, and there should be a complete citation of authorities for any alteration made in the text.

REFORM OF THE CODE OF CIVIL PROCEDURE BY A REVISION OF THE PRACTICE

But however accurate classification and consolidation may be they will not accomplish the reform in the practice which is so much needed.

Classification and consolidation alone leave the practice as it is and if there is to be a removal of the evils in the code there must be a revision as well as a classification and consolidation.

In view of the uncertainty and delay in judicial administration and the growing want of confidence in the present judicial system it will not answer our sense of duty to say that we should

> "Rather bear those ills we have
> Than fly to others that we know not of,"

but we should be prompted to "reform it all together."

There are reasons for a thorough reform "beyond the convenience of the profession" [21] and there should be a "clean cut down to the basic principles of jurisprudence." [22] This does not mean however that the existing practice should be entirely abandoned and that an entirely new system should be substituted in its stead. It does not mean that the fundamental idea underlying our judicial system of a legislative practice act should be discarded and that a system of rules like the English scheme should be substituted in its place. The present practice has been the

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[21] Report of the New York State Bar Association, 1909, address of John G. Milburn, p. 192.

[22] Report of the New York State Bar Association, 1910, address of Senator Elihu Root, p. 618.

result of a process of evolution from the common law system which we inherited from the mother country and while it has retained some of the demerits of that system and has developed defects of its own many of its provisions have been construed by the courts and much of its language has come to have a well defined meaning and the practice is more or less familiar to the profession. It would not be advisable therefore to abolish it out of hand but nevertheless there should be no hesitancy in making a change when a change would result in an improvement of the practice.

A total repeal of the present system would be demoralizing. It would be unwise to adopt a practice act not based upon the present code. The bar should not be required to acquaint itself with an entirely new system of practice but no objection should be raised to the elimination of the present evils in judicial administration and the simplification of the trials of controversies in the courts. The practice in civil cases should be made so simple and elastic that the rights of the parties may be arrived at with the least restraint and delay consistent with the orderly administration of justice.

In the drafting of a new practice act the idea of Lord Bacon may well be borne in mind:

> "The work which I propound, tendeth to pruning and grafting the law, and not to a ploughing up and planting it again; for such a remove I should hold indeed for a perilous innovation. But in the way I now propound, the entire body and substance of the law shall remain, only discharged of idle and unprofitable or hurtful matter; and illustrated by order and other helps, towards the better understanding of it, and judgment thereupon."

The first principle that should control the drafting of a practice act may be stated as follows: [23]

RULE 1. *The practice should be governed by a legislative practice act, which should be as brief as possible, and which should be supplemented by suitable rules of court, both the practice act and rules being arranged according to the same logical analysis following the steps in an action; its provisions, so far as practicable, should be general in their character, with few exceptions to such provisions and with the omission of minute details of practice; and the courts should have ample power to make rules for the orderly and expeditious dispatch of causes unhampered by technical statutory requirements.*[24]

GENERAL PROVISIONS

The foregoing suggestions on the subject of revision are general in their character and we now come to the specific suggestions that have been made from time to time for the

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[23] "Some Principles of Procedural Reform." Illinois Law Review, 1909-10, pp. 388, 491.

[24] A valuable contribution to the subject of the remedies to obviate delays and unnecessary cost in litigation is the report of the Special Committee of the American Bar Association contained in the reports of that association for 1909, page 578, *et seq.* and 1910, page 365, *et seq.* The first and second principles of practice reform given by the committee, and the first of which the committee says is "the first and most fundamental in a program of procedural reform" are as follows:

> "1. A Practice Act should deal only with the general features of procedure and prescribe the general lines to be followed, leaving details to be fixed by rules of court, which the courts may change from time to time as actual experience of their application and operation dictates.
>
> 2. In framing a Practice Act or rules thereunder, careful distinction should be made between rules of procedure intended solely to provide for the orderly dispatch of business, saving of time and maintenance of the dignity of tribunals, on the one hand, and rules of procedure intended to secure to all parties a fair opportunity to meet the case against them and a full opportunity to present their own case, on the other hand; rulings on the former should be reviewable only for abuse of discretion, and nothing should depend on or be obtainable through the latter except the securing of such opportunity."

reformation of the practice and the rules according to which the revision should proceed. The most convenient method for treating these matters is to group them under the steps of an action: (1) General Provisions, (2) Commencement, (3) Trial, (4) Judgment, (5) Appeals, (6) Satisfaction, and after having made specific suggestions to state as well as can be done the general principle that should be followed with respect to the revision under each head.

TRANSFORMING ALL PROCEEDINGS INTO ONE FORM OF ACTION

A long step will be taken toward the removal of the present delay and intricacies in civil practice if every proceeding in the courts, except an intermediate application, were made an action.

If such a change were made the form of action to secure the enforcement of a right would be known without reflection. It would then be a question merely of the proper statement of the plaintiff's claim, and he could not be thrown out of court because he had entered through the wrong door.

Under the present system it is quite as difficult sometimes to determine the form of action or proceeding that should be taken as to secure relief after the litigant is in court.

There should be but one form of action, with all the provisions relating to the practice as general and as uniform as possible.

The very first rule of the English practice provides that:

> "All actions which, previously to the commencement of the Principal Act, were commenced by writ in the Superior Courts of Common Pleas at Westminster, or in the Court of Common Pleas at Lancaster, or in the Court of Pleas at Durham, and all suits which, previously to the commencement of the Principal Act, were

> commenced by bill or information in the High Court of Chancery, or by a cause *in rem* or *in personam* in the High Court of Admiralty, or by citation or otherwise in the Court of Probate, shall be instituted in the High Court of Justice by a proceeding to be called an action."[25]

The special proceedings are relics of the old practice and can be transformed into actions without constitutional change with the possible exception of the writ of *habeas corpus*.

A sufficient examination of these proceedings has been made to warrant the statement that this change is possible. There is no more reason for retaining such words as "mandamus," "prohibition" and "certiorari" than there was for the retention of the names of the different kinds of common-law actions.

In the English jurisprudence a mandamus is an action. Rule 1 of Order 53 provides that:

> "The plaintiff, in any action in which he shall claim a mandamus to command the defendant to fulfil any duty in the fulfilment of which the plaintiff is personally interested, shall endorse such claim upon the writ of summons."[26]

The special proceedings in the code were examined and the provisions of each one were distributed according to the steps in an action. The provisions on the same subject in each proceeding were then brought together from which consolidation one special proceeding could readily be prepared and then transformed into an action and distributed in a general practice act without disturbing the substance of the present practice.

With respect to many proceedings there is now no dis-

[25] Annual Practice of the Supreme Court for 1911, Vol. 1, Order 1, Rule 1, p. 1.

[26] *Id.* Order 53, p. 836.

tinction between them and an ordinary action except in name. The ordinary foreclosure of a mortgage, for instance, is an action, but the foreclosure of a lien on a vessel is a proceeding, while the foreclosure of a lien on a chattel and the foreclosure of a mechanic's lien on real estate are actions.

The idea of converting special proceedings into actions is not a new one. When the Field code was adopted the sixty or more different forms of actions were abolished and one form created in their stead. The special proceedings were not collated in this code and they existed principally in the Revised Statutes. When the courts came to construe the Field code they held that some of these proceedings were in the nature of actions and could be prosecuted either as a proceeding or as an action, and when the Throop code was enacted such proceedings were transformed into actions.

In the same manner various writs were abolished and forms of actions substituted in their stead. There existed in the Revised Statutes of 1829 the writ of *scire facias,* a proceeding known as *quo warranto,* a writ of nuisance and a proceeding called the creditors' bill, all of which were abolished by the Field code and the remedy by action substituted in their stead. The proceeding for dower, for partition, and for the determination of claims to real property under the Revised Statutes of 1829 could be carried on either as actions or proceedings after the enactment of the Field code. Under the Throop code the confusion arising from the two methods of procedure allowed by the courts was removed by repealing the provisions of the Revised Statutes relating to the last three proceedings and converting them into actions so that under the Code of Civil Procedure there are the following actions that were proceedings in the Revised Statutes: Judgment creditor's action; actions by the attorney-general against corpora-

tions; for nuisance; dower; partition; determination of claims to real property and against joint debtors not summoned.

The advantage of having but one form of proceeding in civil actions was recognized by both Field and Throop.

Field said:

> "The form of civil actions under the Code is in its nature adapted to almost every case requiring the interposition of judicial authority. In making provisions for proceedings in special cases, it has been deemed wise to conform as far as practicable, to the system already adopted in civil actions, and to make provision for points of difference only."

Throop said:

> "It was a prominent feature of the plan of this Code to convert special proceedings into actions, so far as that could be done without impairing rights or weakening the efficiency of former remedies."

The development of civil proceedings in the courts of this State, therefore, has been along the line of changing proceedings into actions and the creation of one form of action.

GREATER SIMPLICITY IN RELATION TO MOTIONS AND ORDERS

Every practitioner is familiar with the delay and waste of time incident to motions and orders in actions and proceedings.

The moving papers and the notice of motion must be prepared. They must be served on the proper parties. The proposed order with notice of settlement must usually be prepared and served and finally the order must be served with notice of entry. This delay and waste of time can all be saved if the practice prevailing in Pennsylvania for

instance were followed. There the moving papers are filed with the clerk by dropping them in a box in the clerk's office and serving a copy upon the opposing counsel. No notice of issue is filed. The clerk puts the motion on the calendar from the motion papers themselves. After the argument the court decides the motion by denying it, granting it or imposing such terms as seems proper and files the decision with the clerk. No proposed order is prepared, no notice of settlement is necessary, no notice of entry or order is required but the clerk briefly notes the result of the motion on the docket and that ends the matter.[27]

A bill embodying somewhat similar suggestions upon this subject was prepared by the Special Committee of the Association of the Bar of the City of New York on Simplification of Procedure and was endorsed by the association but was defeated in the senate.

A good deal of the delay in litigation and a vast amount of the time of the courts is taken up with orders and motions in actions made at different stages when all of them or nearly all might be disposed of at one time as is the practice in England.

SUMMONS FOR DIRECTIONS TO DISPOSE OF PRELIMINARY MATTERS BEFORE TRIAL

That jurisdiction has what is known as the "summons for directions" in which all matters are disposed of which under our practice are the subject of repeated motions and appeals. The plaintiff under the English practice is required to take out a summons for direction[28] upon the return of which an order is made for all of the proceedings to be taken in the action especially relating to plead-

[27] A discussion of New York Procedure, by C. Andrade, Jr., p. 8.

[28] Annual Practice of the Supreme Court for 1911, Vol. 1, Order 30, Rule 1 (a), p. 419.

ings, particulars, admissions, discovery, interrogatories, inspection of documents, inspection of real or personal property, commissions, examination of witnesses, place and mode of trial.

Some of the English rules upon this subject are as follows:

> "Upon the hearing of the summons the Court or a Judge shall, so far as practicable, make such order as may be just with respect to all the proceedings to be taken in the action, and as to the costs thereof, and more particularly with respect to the following matters:— Pleading, particulars, admissions, discovery, interrogatories, inspection of documents, inspection of real or personal property, commissions, examination of witnesses, place and mode of trial. Such order shall be in the Form No. 4A, Appendix K., with such variations as circumstances may require." [29]
>
> "No affidavit shall be used on the hearing of the said summons except by special order of the Court or a Judge." [30]
>
> "On the hearing of the summons any party to whom the summons is addressed shall, so far as practicable, apply for any order or directions as to any interlocutory matter or thing in the action which he may desire." [31]
>
> "On the hearing of the summons, the Court or a Judge may order that evidence of any particular fact, to be specified in the order, shall be given by statement on oath of information and belief, or by production of documents or entries in books, or by copies of documents or entries or otherwise as the Court or Judge may direct." [32]

An "omnibus motion" to strike out a pleading or any part thereof or to render it more definite and certain was

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[29] Annual Practice of the Supreme Court for 1911, Vol. 1, Order 30, Rule 2, p. 427.
[30] *Id.* Order 30, Rule 3, p. 429.
[31] *Id.* Order 30, Rule 4, p. 429.
[32] *Id.* Order 30, Rule 7, p. 430.

provided for in a bill prepared by the Special Committee of the Association of the Bar of the City of New York on Simplification of Procedure which was introduced in the legislature of 1909.[33]

The principle that should govern the drafting of a legislative practice act with respect to its general provisions is as follows:

RULE 2. *The general provisions, applicable to more than one step in an action, should be broad and liberal in terms, should omit minute details, should contain few exceptions and should leave a wide discretion in the courts.*

COMMENCEMENT

The first step in the course of an action is its commencement, and under this head in the analysis should be grouped among other subjects, the provisions relating to the summons or process, parties, pleadings, service of papers, preparations for trial including admissions, discovery and examinations before trial. You will see in these subjects a fruitful field for improvement. Our rule with reference to parties is narrow, our pleadings are verbose to a laughable extent and the provisions relating to admissions, discovery and examinations before trial are technical and troublesome.

GREATER LIBERALITY AS TO JOINDER OF PARTIES

Not only should the suggestion be adopted with reference to the reduction of all proceedings to one form of action but greater liberality should be allowed in the matter of the joinder of parties in an action.

No action should be defeated by reason of any misjoinder or non-joinder of parties and the courts should

[33]The proposed recommendation was endorsed by the Association of the Bar of the City of New York, and was passed by the legislature, but was vetoed by the Governor.

have power when necessary to bring in any parties in order to determine the issues involved in the pleadings.

Much greater latitude in this respect is permitted by the practice in some jurisdictions.

Many actions in this state fail because of non-joinder or mis-joinder of parties which would be disposed of in other jurisdictions by eliminating the unnecessary parties or by bringing in new parties.

The greater liberality of the English practice may be best illustrated by quoting some of the rules on the subject of parties:

> "All persons may be joined in one action as plaintiffs, in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative, where if such persons brought separate actions any common question of law or fact would arise; provided that, if upon the application of any defendant it shall appear that such joinder may embarrass or delay the trial of the action, the Court or a Judge may order separate trials, or make such other order as may be expedient. And judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment. But the defendant, though unsuccessful, shall be entitled to his costs occasioned by so joining any person who shall not be found entitled to relief, unless the Court or a Judge in disposing of the costs shall otherwise direct." [34]

> "Where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff, the Court or a Judge may, if satisfied that it has been so commenced through a bona fide mistake, and that it is necessary for the determination

[34] Annual Practice of the Supreme Court for 1911, Order 16, Rule 1, p. 170.

of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as may be just." [35]

"All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities, without any amendment." [36]

"It shall not be necessary that every defendant shall be interested as to all the relief prayed for, or as to every cause of action included in any proceeding against him; but the Court or a Judge may make such order as may appear just to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in which he may have no interest." [37]

"Where the plaintiff is in doubt as to the person from whom he is entitled to redress, he may, in such manner as hereinafter mentioned, or as may be prescribed by any special order, join two or more defendants, to the intent that the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between all parties." [38]

"Trustees, executors, and administrators may sue and be sued on behalf of or as representing the property or estate of which they are trustees or representatives, without joining any of the persons beneficially interested in the trust or estate, and shall be considered as representing such persons; but the Court or a Judge may, at any stage of the proceedings, order any of such persons to be made parties, either in addition to or in lieu of the previously existing parties." [39]

"No cause or matter shall be defeated by reason of the mis-joinder or non-joinder of parties, and the

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[35] Annual Practice of the Supreme Court for 1911, Order 16, Rule 2, p. 177.

[36] *Id.* Order 16, Rule 4, p. 178.

[37] *Id.* Order 16, Rule 5, p. 181.

[38] *Id.* Order 16, Rule 7, p. 182.

[39] *Id.* Order 16, Rule 8, p. 183.

Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The Court or a Judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court or a Judge to be just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out, and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added." [40]

MORE LIBERALITY IN PLEADINGS[41]

When the proceedings in the courts of record have been reduced to one form of action and greater latitude has been allowed as to joinder of parties a further reform can be accomplished by allowing the litigants to present in one action all of the differences that they may have, legal or equitable, leaving it to the discretion of the court to determine whether or not the disputes can be adjudicated in one action and whether or not there should be a separate trial of any portion of the issues.[42]

This is not a new suggestion.[43] The idea is embodied in the English practice which permits the plaintiff to unite

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[40]Annual Practice of the Supreme Court for 1911, Order 16, Rule 11, p. 191.

[41]In the report of the Special Committee of the American Bar Association to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation the rule with respect to pleadings is stated as follows:

"The sole office of pleadings should be to give notice to the respective parties of the claims, defenses and cross-demands asserted by their adversaries; the pleader should not be held to state all the elements of claim, defense or cross-demand, but merely to apprise his adversary fairly of what such claim, defense or cross-demand is to be." (Report American Bar Association 1910, p. 638.)

[42]Another salutary rule would be that "Every suit should be instituted in the court of lowest grade competent to try it."

[43]See "Further Reforms in Procedure," by Edward B. Whitney.

in the same action several causes of action and the defendant to set up in his defense any right or claim which he may have against the plaintiff, leaving it to the discretion of the court to order separate trials when necessary.

> "Subject to the following Rules of this Order, the plaintiff may unite in the same action several causes of action; but if it appear to the Court or a Judge that any such causes of action cannot be conveniently tried or disposed of together, the Court or Judge may order separate trials of any of such causes of action to be had, or may make such other order as may be necessary or expedient for the separate disposal thereof." [44]

> "A defendant in an action may set off, or set up by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set off or counterclaim sound in damages or not, and such set off or counterclaim shall have the same effect as a cross action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross claim. But the Court or a Judge may, on the application of the plaintiff before trial, if in the opinion of the Court or Judge such set off or counterclaim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof." [45]

The practice now requires the statute of limitations to be pleaded as a defence and it has been suggested that the plaintiff or counterclaimant should state in his pleading whatever facts he may rely upon as saving him from the statute of limitations so that the question of the applicability of the statute may be promptly settled; that the plaintiff should be permitted to demur to an answer as the

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[44] Annual Practice of the Supreme Court for 1911, Order 18, Rule 1, p. 258.

[45] *Id.* Order 19, Rule 3, p. 269.

defendant may demur to a reply; that the reply to a counterclaim should state any technical objections that do not appear upon the face of the counterclaim; that a demurrer after answer and before trial should be permitted in the discretion of the court so that questions which may be raised on the trial may be disposed of before trial in the discretion of the court; that a special demurrer should be permitted so that all objections to a pleading may be raised at the same time and all disposed of expeditiously; that a party should be permitted both to demur and to answer separately in order that the issues for trial may not be postponed until after the settlement of the demurrer; that the plaintiff should be permitted to serve a rejoinder to a reply; that the usual motion to strike out irrelevant, redundant or scandalous matter should be supplemented by a demurrer making the demurrer broad enough to cover these matters;[46] but the better practice perhaps would be to abolish the demurrer entirely and have the questions now raised by demurrer raised in the answer and disposed of on the trial or better still to have all the preliminary objections and relief disposed of at one time as is the practice under the English system.[47]

The Committee of the Association of the Bar of the City of New York on the Simplification of Procedure recommended that on demand made by any party, the adverse party should within ten days thereafter file the original or a sworn copy of any contract, bill or note, upon which the action, defence or counterclaim was founded, the court having power to enforce such filing and the paper when filed being deemed a part of the pleadings.[48]

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[46]See "Further Reforms in Procedure," by Edward B. Whitney.

[47]Annual Practice of the Supreme Court for 1911, Vol. 1, Order 30, Rule 1 (a), p. 419.

[48]A bill embodying these suggestions was endorsed by the Association of the Bar of the City of New York. Passed the Senate in 1910 and reached third reading in the Assembly.

BREVITY IN FORMS OF PLEADINGS

After the allowance of the joinder of all causes of action in one suit a further reformation could be effected by the adoption of simple forms of pleading.

Pleadings are too long and the idea prevails that set words are required. The young practitioner usually consults some form book before drawing his pleadings even in the case of the simplest action. He has a notion that some particular set of words is essential and this idea is encouraged by the technical construction given to pleadings by the courts.

In construing pleadings the inquiry by the courts seems to be "Has the party stated a cause of action" when it should be "Has the party a cause of action." The merits of the controversy should be placed above mere words and the courts should go beyond the forms of pleadings to ascertain whether or not the party has a cause of action and a broad discretion should be vested in the courts to permit amendments to make pleadings conform to the cause of action which really exists.

This change as to the form of pleadings can best be accomplished by promulgating samples of forms which will answer for each class of cases.

When the Field code was adopted it was intended that it should be supplemented by a set of forms and such forms were drawn and submitted to the legislature but were not adopted. Had these forms been passed by the legislature, it is likely that they would have brought about greater simplicity in pleadings.

The English rules of the Supreme Court have an extensive set of forms and show a great simplicity as compared with our technical and verbose forms. In actions for instance where the plaintiff seeks only to recover a debt

or liquidated demand in money no pleading is necessary in that jurisdiction on the part of the plaintiff but simply a special endorsement of the summons which answers the purpose of a pleading and this endorsement for goods sold and delivered is "The plaintiff's claim is for the price of goods sold and delivered" followed by the amount; for money had and received "The plaintiff's claim is for money received by the defendant for the use of the plaintiff" giving the amount; for a payee against the maker of a promissory note "The plaintiff's claim is against the defendant, as maker of a promissory note for £250, dated ——, payable four months after date" giving the amount and the others are quite as simple.[49]

In other causes of action which are more involved the English forms are equally simple when compared to those recommended in books of forms in this state.

A comparison between the verbosity and the simplicity of forms recommended in the two jurisdictions may be illustrated by giving the form suggested by Lansing and that submitted by the English practice for a complaint for negligent driving.

Negligent Driving

(English Practice.)[50]

"The plaintiff has suffered damages from personal injuries to the plaintiff and damages to his carriage, caused by the defendant or his servant on the 15th of January, 1899, negligently driving a cart and horse in Fleet street. Particulars of expenses, etc.:

	£	s.	d.
Charges of Mr. Smith, surgeon..	10	10	0
Charges of Mr. Jones, coachmaker	14	5	6
	£24	15	6

The plaintiff claims £150. (Signed)
Delivered."

[49]Annual Practice of the Supreme Court for 1911, Order 3, Rule 6, p. 11; Appendix, Vol. 21, § 4, p. 60.
[50]Annual Practice of the Supreme Court for 1911, Vol. 2. p. 68.

(Lansing's Forms.)[51]

"The complaint of the plaintiff respectfully shows that heretofore, and on the day of , 18 , the said plaintiff, at , was lawfully possessed of a certain carriage, to wit (a chaise), of great value, to wit: of the value dollars, and of a certain horse (or divers, to wit, horses,) then and there drawing the same, and in which said carriage the said plaintiff was then riding in and along a certain public and common highway, and the said defendant was also then and there possessed of a certain other carriage, and of a certain other horse (or divers, to wit, horses) drawing the same, and which said carriage, and horses of the said defendant were then and there under the care, government and direction of (a certain, then servant of) the said defendant, who was then and there driving the same in and along the said highway, to wit, at . Nevertheless the said defendant then and there (by his said servant) so carelessly and improperly drove, governed and directed his said carriage and horses, that by and through the carelessness, negligence and improper conduct of the said defendant (by his said servant), in that behalf (one of the hind wheels of), the said carriage of the said defendant then and there ran and struck with great force and violence upon and against the said carriage of the said plaintiff, and thereby then and there crushed, broke to pieces, damaged and destroyed the same (and one of the wheels, and the splinter bar and one of the shafts thereof), and the said carriage of the said plaintiff thereby then and there became and was rendered of no use or value to the said plaintiff, and thereby the said plaintiff was then and there cast out and thrown with great force and violence from and off his said carriage to and upon the ground, and thereby and by means of the several premises aforesaid, the said plaintiff was then and there greatly bruised, hurt and wounded, and became and was sick,

[51]Lansing's Forms of Civil Procedure, p. 800.

sore lame and disordered, and so remained and continued for a long space of time, to wit: hitherto, during all which time the said plaintiff suffered great pain and was hindered and prevented from performing and transacting his lawful affairs and business by him during that time to be done and transacted; and also by means of the premises, was forced and obliged to pay, lay out and expend, and hath necessarily paid, laid out and expended, divers large sums of money to wit: the sum of dollars, in and about endeavoring to be healed and cured of his said wounds, hurts and bruises, occasioned as aforesaid; and also by means of the premises, the said plaintiff hath paid, laid out and expended a large sum of money, to wit: the sum of dollars, in and about the repairing of the said chaise so damaged as aforesaid."

A few more English forms taken from the Annual Practice of the Supreme Court of England for 1911 may be submitted for the purpose of emphasizing the suggestion that a great reformation can be accomplished in the matter of pleadings in the courts of this state.

Dissolution of Partnership[52]

"1. The plaintiff on December 20th, 1895, entered into partnership articles with the defendant for ten years.

2. The defendant has broken the partnership articles as follows:—

a.

b.

c.

The plaintiff claims:—

1. Dissolution.
2. Accounts and inquiries.
3. A receiver and manager.

(Signed)

Delivered."

[52]Annual Practice of the Supreme Court for 1911, Vol. 2, p. 54.

Goods Sold and Delivered[53]

"The plaintiff's claim is for the price of goods sold, and delivered.

Particulars: —

1898 — 31st December —

	£	s.	d.
Balance of account for butcher's meat to this date.....	35	10	0
1899 — 1st Jan. to 31st March — Butcher's meat	74	5	0
	109	15	0
1899 — 1st February — paid....	45	0	0
Balance due	£64	15	0

(Signed)"

Money Had and Received[54]

"The plaintiff's claim is for money received by the defendant for the use of the plaintiff.

Particulars: —

1882 — 1st January.—	£	s.	d.
To amount of rents of No. 5, Smith street, collected by the defendant	72	10	0
To deposit on intended sale of Eva villa	100	0	0
Amount due	£172	10	0

(Signed)"

Payee Against Maker of Promissory Note[54a]

"The plaintiff's claim is against the defendant, as maker of a promissory note for 250l, dated 1st January, 1899, payable four months after date.

Particulars: —

Principal	£250
Interest	10
Amount due	£260

(Signed)"

[53]Annual Practice of the Supreme Court for 1911, Vol. 2, p. 65; [54]p. 61; [54a]p. 61.

Passenger Against Railway Company for Negligence[55]

"The plaintiff has suffered damage from the defendant's negligence in carrying the plaintiff as passenger by railway from London to Brighton, causing personal injuries to the plaintiff, in a collision near Hayward's Heath, on the , 19 .

Particulars of expenses, etc.: —

	£	s.	d.
Loss of fifteen weeks' salary as clerk at £2 per week.....	30	0	0
Dr. Smith	10	10	0
Nurse for six weeks	3	0	0
Total	£43	10	0

The plaintiff claims £500.

(Signed)

Delivered."

Malicious Prosecution[56]

"The defendant maliciously and without reasonable and probable cause preferred a charge of larceny against the plaintiff before a justice of the peace, causing the plaintiff to be sent for trial on the charge and imprisoned thereon, and prosecuted the plaintiff thereon at the Middlesex Quarter Sessions, where the plaintiff was acquitted.

Particulars of special damages: —

Messrs. L. and L's bill of costs.....	£65
Loss in business from January 1, 1899, to February 18, 1899	£100

The plaintiff claims £500.

(Signed)

Delivered."

[55]Annual Practice of the Supreme Court for 1911, Vol. 2, p. 66; [56]p. 72.

The English practice enforces an observance of its rules with reference to simplicity of pleadings by providing a penalty for prolixity.

The general rule with reference to prolixity in pleadings provides that:

> "Such statements shall be as brief as the nature of the case will admit, and the taxing officer in adjusting the costs of the action shall at the instance of any party, or may without any request, inquire into any unnecessary prolixity, and order the costs occasioned by such prolixity to be borne by the party chargeable with the same." [57]

A similar penalty is imposed for prolixity in the endorsement of a summons where the action is one on a contract or for a liquidated claim.[58]

While the English rules require that certain forms shall be used,[59] the great liberality in the matter of pleadings in that jurisdiction is further shown by the rule that: "No technical objection shall be raised to any pleading on the ground of any alleged want of form." [60] and by the further rule that: "The Court or a Judge may at any stage of the proceedings order to be struck out or amended any matter in any indorsement or pleading which may be unnecessary or scandalous or which may tend to prejudice, embarrass, or delay the fair trial of the action; and may in any such case, if they or he shall think fit, order the costs of the application to be paid between solicitor and client." [61]

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[57] Annual Practice of the Supreme Court for 1911, Vol. 1, Order 19, Rule 2, p. 268.
[58] *Id.* Order 2, Rule 2, p. 7.
[59] *Id.* Order 19, Rule 5, p. 275.
[60] *Id.* Order 19, Rule 26, p. 301.
[61] *Id.* Order 19, Rule 27, p. 301.

The English rules also provide that no plea or defense shall be pleaded in abatement,[62] that except in admiralty cases no reply shall be made unless the same be ordered,[63] and that no demurrer shall be allowed.[64]

The final determination of litigation could also be hastened by shortening the time within which pleadings may be served.

GREATER LIBERALITY IN THE PROVISIONS AS TO SERVICE OF PAPERS

The provisions of the practice in this state relating to substituted service are technical and troublesome and greater latitude should be given to the courts in respect to the manner in which service should be made in certain cases.

Some of the English rules upon this subject are as follows:

> "When service is required the writ shall, wherever it is practicable, be served in the manner in which personal service is now made, but if it be made to appear to the Court or a Judge that the plaintiff is from any cause unable to effect prompt personal service, the Court or Judge may make such order for substituted or other service, or for the substitution for service of notice, by advertisement or otherwise, as may be just." [65]
>
> "When an infant is a defendant to the action, service on his father or guardian, or if none, then upon the person with whom the infant resides or under whose care he is, shall, unless the Court or a Judge otherwise orders, be deemed good service on the infant; provided that the Court or a Judge may order

[62] Annual Practice of the Supreme Court for 1911, Vol. 1, Order 21, Rule 20, p. 320.
[63] *Id.* Order 23, Rule 1, p. 356.
[64] *Id.* Order 25, Rule 1, p. 361.
[65] *Id.* Order 9, Rule 2, p. 51.

that service made or to be made on the infant shall be deemed good service." [66]

"When a lunatic or person of unsound mind not so found by inquisition is a defendant to the action, service on the committee of the lunatic, or on the person with whom the person of unsound mind resides or under whose care he is, shall, unless the Court or a Judge otherwise orders, be deemed good service on such defendant." [67]

MORE LIBERAL PROVISIONS AS TO DISCOVERY OF BOOKS AND PAPERS AND PRODUCTION OF DOCUMENTS

The law reform committee of the New York State Bar Association recommended that special attention be given to the revision of those portions of the Code of Civil Procedure and of the rules of the supreme court relating to the discovery of books and papers and in that connection the English rules are well worth reading:

"Any party may, without filing any affidavit, apply to the Court or a Judge for an order directing any other party to any cause or matter to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein. On the hearing of such application the Court or Judge may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the cause or matter, or make such order, either generally or limited to certain classes of documents, as may, in their or his discretion be thought fit. Provided that discovery shall not be ordered when and so far as the Court or Judge shall be of opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs." [68]

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[66] Annual Practice of the Supreme Court for 1911, Vol. 1, Order 9, Rule 4, p. 55.
[67] *Id.* Order 9, Rule 5, p. 55.
[68] *Id.* Order 31, Rule 12, p. 458.

"The Court or a Judge may, on the application of any party to a cause or matter at any time, and whether an affidavit of documents shall, or shall not have already been ordered or made, make an order requiring any other party to state by affidavit whether any one or more specific documents, to be specified in the application, is or are, or has or have at any time been in his possession or power; and, if not then in his possession, when he parted with the same, and what has become thereof. Such application shall be made on an affidavit stating that in the belief of the deponent the party against whom the application is made has, or has at some time had in his possession or power the document or documents specified in the application, and that they relate to the matters in question in the cause or matter, or to some of them." [69]

MORE FREEDOM AND LIBERALITY IN RELATION TO EXAMINATIONS BEFORE TRIAL

The committee on law reform of the New York State Bar Association also called attention to the difficulties under our practice in the matter of the examination of witnesses or parties before trial and the English rule may well be cited upon that subject to illustrate the greater simplicity of the practice in this respect in that jurisdiction:

"In any cause or matter the plaintiff or defendant by leave of the Court or a Judge may deliver interrogatories in writing for the examination of the opposite parties, or any one or more of such parties, and such interrogatories when delivered shall have a note at the foot thereof, stating which of such interrogatories each of such persons is required to answer: Provided that no party shall deliver more than one set of interrogatories to the same party without an order for that purpose: Provided also that interrogatories which do not relate to any matters in question in the cause or matter shall be deemed irrelevant, not-

[69] Annual Practice of the Supreme Court for 1911, Vol 1, Order 31, Rule 19A, (3), p. 470.

withstanding that they might be admissible on the oral cross-examination of a witness." [70]

"Either party may call upon the other party to admit any document, saving all just exceptions; and in case or refusal or neglect to admit, after such notice, the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the result of the cause or matter may be, unless at the trial or hearing the Court or a Judge shall certify that the refusal to admit was reasonable; and no costs of proving any document shall be allowed unless such notice be given, except where the omission to give the notice is, in the opinion of the taxing officer, a saving of expense." [71]

"Any party may, by notice in writing, at any time not later than nine days before the day for which notice of trial has been given, call on any other party to admit, for the purposes of the cause, matter, or issue only, any specific fact or facts mentioned in such notice. And in case of refusal or neglect to admit the same within six days after service of such notice, or within such further time as may be allowed by the Court or a Judge, the costs of proving such fact or facts shall be paid by the party so neglecting or refusing, whatever the result of the cause, matter, or issue may be, unless at the trial or hearing the Court or a Judge certify that the refusal to admit was reasonable, or unless the Court or a Judge shall at any time otherwise order or direct. Provided that any admission made in pursuance of such notice is to be deemed to be made only for the purposes of the particular cause, matter, or issue, and not as an admission to be used against the party on any other occasion or in favor of any person other than the party giving the notice: provided also, that the Court or a Judge may at any time allow any party to amend or withdraw any admission so made on such terms as may be just." [72]

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[70] Annual Practice of the Supreme Court for 1911, Vol. 1, Order 31, Rule 1, p. 431.
[71] *Id.* Order 32, Rule 2, p. 478.
[72] *Id.* Order 32, Rule 4, p. 479.

"Any party may at any stage of a cause or matter, where admissions of fact have been made, either on the pleadings, or otherwise, apply to the Court or a Judge for such Judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the Court or a Judge may upon such application make such order, or give such judgment, as the Court or Judge may think just." [73]

Other English rules upon the subject of notice to produce for inspection documents referred to in pleadings or affidavits and notice to admit documents and facts may also be cited:

"Every party to a cause or matter shall be entitled, at any time, by notice in writing, to give notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his solicitor, and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such cause or matter, unless he shall satisfy the Court or a Judge that such document relates only to his own title, he being a defendant to the cause or matter, or that he had some other cause or excuse which the Court or Judge shall deem sufficient for not complying with such notice, in which case the Court or Judge may allow the same to be put in evidence on such terms as to costs and otherwise as the Court or Judge shall think fit.[74]

The Special Committee of the Association of the Bar of the City of New York on Simplification of Procedure recommended that upon a trial either party might call his

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[73] Annual Practice of the Supreme Court for 1911, Vol. 1, Order 32, Rule 6, p. 480.

[74] *Id.* Order 31, Rule 15, p. 467.

opponent, or any officer of any corporation that is a party, and cross-examine him.[75]

The principle that should govern the drafting of a legislative practice act with respect to the provisions relating to the commencement of the action is as follows:

RULE 3. *There should be provision for a complete disposition of the entire controversy, by the joinder of all parties, whether jointly, severally or in the alternative; for a simple statement of all differences between them, subject to an order for a separate trial, in the discretion of the court, of any issue; for the determination at one time, so far as practicable, of preliminary questions such as pleadings, parties, admissions, discovery, interrogatories, inspection, commissions, examinations, place and mode of trial; and for a wide latitude as to securing evidence for trial.*

TRIALS

We all appreciate the evils of our present system of trials. They are prolonged to an undue length and are too replete with technical points. We have had within recent times striking illustrations of the expedition with which trials are conducted in other jurisdictions, and there is no reason why a reform can not be accomplished in our own state in this respect.

One of the most striking suggestions made on this subject is that the facts so far as possible should be disposed of finally on one trial. This means that where certain facts have been passed upon by a jury or by a court they should be considered as having been finally established for all subsequent proceedings in that action.

This subject was considered by the special committee of the American Bar Association to suggest remedies and

[75]This recommendation was endorsed by the Association of the Bar of the City of New York, and was embodied in a bill which was defeated in the Senate of 1910.

formulate proposed laws to prevent delay and unnecessary cost in litigation, and it submitted the following principles and propositions that should govern upon this subject:[75a]

"The equitable principle of complete disposition of the entire controversy between the parties should be extended to its full extent and applied to every type of proceeding.

(1.) The courts should have power and it should be their duty in every sort of cause or proceeding to grant any relief or allow any defense or cross-demand which the facts shown and the substantive law may require.

(2.) No cause or proceeding should fail or be dismissed for want of necessary parties or for non-joinder of parties, but provision should be made to bring them in.

(3.) Joinder of all parties proper to a complete disposition of the entire controversy should be allowed in every sort of cause, and at every stage thereof, even though they are not all interested in the entire controversy.

(4.) Courts should have power in all proceedings to render such judgment against such parties before it as the case made requires in point of substantive law, to render different judgments against different parties or in favor of some and against others, whether on the same side of the cause or not, and to dismiss some and grant relief to or against others, imposing costs in case of misjoinder or unnecessary joinder upon the party or parties responsible therefor."

"So far as possible, all questions of fact should be disposed of finally upon one trial.

(1.) Questions of law conclusive of the controversy or of some part thereof should be reserved and a verdict should be taken subject thereto, if the questions are at all doubtful, with

[75a] Report American Bar Association, 1910, p. 614 *et seq.*

power in the court and in any other court to which the cause may be taken on appeal, to enter judgment, either upon the verdict or upon the point reserved, as its judgment upon such point may require.

(2.) In case a new trial is granted, it should only be a new trial of the question or questions with respect to which the verdict or decision is found to be wrong, if separable.

(3.) Wherever a different measure of relief or measure of damages must be applied depending upon which view of a doubtful question of law is taken ultimately, the trial court should have power and it should be its duty to submit the cause to the jury upon each alternative and take its verdict thereon, with power in the trial court and in any court to which the cause may be taken, on appeal, to render judgment upon the one which its decision of the point of law involved may require.

(4.) Any court to which the cause is taken on appeal should have power to take additional evidence, by affidavit, deposition or reference to a master, for the purpose of sustaining a verdict or judgment whenever the error complained of is lack of proof of some matter capable of proof by record or other incontrovertible evidence, defective certification or failure to lay the proper foundation for evidence which can, in fact, without involving some question for a jury, be shown to be competent."

The expedition in the determination of controversies in the English courts is largely due to the working out of the above suggestions as to the determination of facts so far as possible on one trial. Two of the English rules upon this subject provide as follows:

"A new trial shall not be granted on the ground of misdirection or of the improper admission or rejection

of evidence, or because the verdict of the jury was not taken upon a question which the Judge at the trial was not asked to leave to them, unless in the opinion of the Court to which the application is made some substantial wrong or miscarriage has been thereby occasioned in the trial; and if it appears to such Court that such wrong or miscarriage affects part only of the matter in controversy, or some or one only of the parties, the Court may give final judgment as to part thereof, or some or one only of the parties, and direct a new trial as to the other part only or as to the other party or parties."[76]

"A new trial may be ordered on any question, whatever be the grounds for the new trial, without interfering with the finding or decision upon any other question."[77]

One of the remedies lies in the selection of the jury. Too much time is consumed in the examination and selection of the jury. The speed with which a jury is selected in the English jurisdiction is almost unbelievable and yet it must be admitted that English justice is quite as good as American justice. The method of selecting a jury can be very much simplified and the time of trials very much shortened by a change in the method of the examination and the selection of the jury.

Every practitioner is familiar with the technicalities connected with the rule requiring exceptions to be taken to the rulings of the court.[78]

An exception must be taken to each objection and one to the motion to dismiss or nonsuit whether at the close of the

[76]English Practice, Order 39, Rule 6.

[77]Order 39, Rule 7.

[78]The following is the principle on this subject laid down by the Special Committee of the American Bar Association to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation:

"So far as they merely reiterate objections already made and ruled upon, exceptions should be abolished; it should be enough that due objection was interposed at the time the ruling in question was made." (Report of the American Bar Association 1910, p. 647.)

plaintiff's case or at the close of the entire case and woe be to him who has failed to have his exception noted upon the record and woe be to him who appears in the appellate court without suitable exceptions.

This practice of taking exceptions, it has been said, is the outgrowth of the days when nothing was taken down upon the record until an objection was made when the question and answer were put in writing and the exception noted. With the modern methods of reporting it is claimed that the practice of noting exceptions is no longer necessary and that much time could be saved and much of the technical atmosphere that now surrounds appeals could be removed if the rule were changed so that no exception would be required.

A good deal of annoyance is occasioned by our practice which requires a motion for new trial to be made when the jury returns its verdict which might be saved if the practice in Pennsylvania were followed which permits the counsel within four days after the rendition of the verdict to make the motion.

The Pennsylvania practice obviates the necessity of waiting about the court room until the jury returns and permits of a more thorough consideration than can be given to the motion at the close of the trial. As a result of the present practice most of the motions for new trial are mere matters of form and are denied as a matter of course.

The Special Committee of the Association of The Bar of the City of New York on the Simplification of Practice recommended that motions for a new trial or for judgment notwithstanding the verdict might be made upon the trial judge's minutes, upon two days notice, within the same term or within ten days thereafter and that upon such a motion the trial judge might in a proper case, instead of granting a new trial, direct such judgment, notwithstand-

ing the verdict, as should have been entered upon the evidence.[79]

It was recommended by the Special Committee of the Association of the Bar of the City of New York on Simplification of Procedure that upon a trial by jury wherever the evidence adduced by either party is insufficient in law to sustain a verdict, or is insufficient reasonably to satisfy a jury that the facts sought to be proved are established, the trial justice should direct such verdict as would be proper had such party adduced no evidence.[80]

It has been suggested that the court in its discretion should be vested with power to order one or more issues to be separately tried prior to the trial of other issues in the case, the purpose being to try those issues which would dispose of the litigation and thus avoid a more protracted trial.[81]

A good deal has been said about the statutory right to two separate trials in actions of ejectment and to the discretionary third trial.

The Committee of Fifteen of the State Bar Association said with reference to this matter:

> "So, too, it may be said of the provisions retaining the right to a second trial in ejectment as a matter of course, and giving a third trial in the discretion of the court. No reason exists why this practice should be continued under which three trials are possible with regard to a piece of land of often nominal value, while a single trial may and must determine the contention as to the value of millions of dollars of personal prop-

[79]This recommendation was endorsed by the Association of the Bar of the City of New York and a bill embodying it was introduced in the legislature.

[80]This recommendation was endorsed by the Association of the Bar of the City of New York and was embodied in a bill which was reported in the Senate in 1910.

[81]Annual Practice of the Supreme Court for 1911, Vol. 1. Order 18, Rule 1, p. 258.

erty and as to any interest in real estate other than in an action for ejectment."[82]

A bill was introduced in the legislature of 1910 at the instance of the special committee of the Association of the Bar of the City of New York on Simplification of Procedure seeking to abolish the second and third trial in ejectment actions but the bill failed of enactment.

Various recommendations were made by the Special Committee of the Association of the Bar of the City of New York on Simplification of Procedure relating to trials in surrogates' courts some of which were embodied in statutes of the state but section 2653a of the Code of Civil Procedure permitting an action in the supreme court to determine the validity or invalidity of a will still remains in force but otherwise the committee with the assistance of the bar associations secured marked reforms in the statutory double trial system in probate cases.

The principle that should govern the drafting of a legislative practice act with respect to the provisions relating to the trial is as follows:

RULE 4. *All questions of fact should be disposed of finally upon one trial, so far as possible, and there should be given to the court power to submit a cause to a jury in such a way, by reserving questions of law or submitting questions in the alternative, that another trial of the same facts may be obviated.*

JUDGMENT

Commercial cases are largely withdrawn from the courts because of the delay in securing judgment and its enforcement.

Commercial cases receive special treatment under the English practice.[83] A commercial division or court was

[82] Report of Committee of Fifteen, p. 24.

[83] "Civil Procedure in England," by Elbridge L. Adams, read before the New York State Bar Association, 1896.

created in 1894 by the judges of the High Court. There is a special assignment of judges for this court and the cases receive a special treatment. These cases include causes "arising out of an ordinary transaction of merchants and traders, among others those relating to the construction of mercantile documents, export or import of merchandise, affreightment, insurance, banking and mercantile agency and mercantile usages." The present state of our practice encourages the settlement or abandonment not only of this class of cases but many others. Litigants in many small claims would rather lose the claim than bear the expense and delay of a proceeding in the courts. In this respect as in many others the practice has not kept pace with the advance of the times. It has remained stationary since the adoption of the present Code of Civil Procedure in 1877 while the times have advanced by rapid strides.

SUMMARY JUDGMENT IN COMMERCIAL CAUSES

A remedy has been afforded in the English practice for commercial cases by providing for a summary judgment in all actions to recover a debt or liquidated demand in money.[84] Under a proceeding known as summary judgment, the plaintiff may on affidavit apply to a judge for liberty to enter final judgment for the amount endorsed upon the summons without other pleadings.

Some of the English provisions relating to summary judgment are as follows:

> "Where the defendant appears to a writ of summons specially indorsed under Order III, Rule 6, the plaintiff may, on affidavit made by himself, or by any other person who can swear positively to the facts,

[84] Annual Practice of the Supreme Court for 1911, Vol. 1, Order 3, Rule 6, p. 11.

verifying the cause of action and the amount claimed (if any), and stating that in his belief there is no defence to the action, apply to a Judge for liberty to enter final judgment for the amount so indorsed, together with interest, if any, or for the recovery of the land (with or without rent or mesne profits), as the case may be, and costs. The Judge may thereupon, unless the defendant by affidavit, by his own viva voce evidence, or otherwise, shall satisfy him that he has a good defence to the action on the merits, or disclose such facts as may be deemed sufficient to entitle him to defend, make an order empowering the plaintiff to enter judgment accordingly."[85]

"If on the hearing of any application under this Rule it shall appear that any claim which could not have been specially indorsed under Order III, Rule 6, has been included in the indorsement on the writ, the Judge may, if he shall think fit, forthwith amend the indorsement by striking out such claim, or may deal with the claim specially indorsed as if no other claim had been included in the indorsement, and allow the action to proceed as respects the residue of the claim."[86]

"The application by the plaintiff for leave to enter final judgment under Rule I shall be made by summons returnable not less than four clear days after service accompanied by a copy of the affidavit and exhibits referred to therein."[87]

"The defendant may show cause against such application by affidavit, or (except in actions for the recovery of land) by offering to bring into Court the sum indorsed on the writ, or the Judge may allow the defendant to be examined upon oath."[88]

"If it appear that the defence set up by the defendant applies only to a part of the plaintiff's claim, or that any part of his claim is admitted, the plaintiff

[85] Annual Practice of the Supreme Court for 1911, Vol. 1, Order 14, Rule 1 (a), p. 138.
[86] *Id.* Order 14, Rule 1 (b), p. 151.
[87] *Id.* Order 14, Rule 2, p. 153.
[88] *Id.* Order 14, Rule 3 (a), p. 153.

shall have judgment forthwith for such part of his claim as the defence does not apply to or as is admitted, subject to such terms, if any, as to suspending execution, or the payment of the amount levied or any part thereof into Court by the sheriff, the taxation of costs, or otherwise, as the Judge may think fit. And the defendant may be allowed to defend as to the residue of the plaintiff's claim."[89]

"If it appears to the judge that any defendant has a good defence to or ought to be permitted to defend the action, and that any other defendant has not such defence and ought not to be permitted to defend, the former may be permitted to defend, and the plaintiff shall be entitled to enter final judgment against the latter, and may issue execution upon such judgment without prejudice to his right to proceed with his action against the former."[90]

"Leave to defend may be given unconditionally, or subject to such terms as to giving security or time or mode of trial or otherwise as the Judge may think fit."[91]

"Upon the hearing of the application, with the consent of the parties, an order may be made referring the action to a Master, or the action may be finally disposed of without appeal in a summary manner."[92]

"Where leave, whether conditional or unconditional, is given to defend, the Judge shall have power to give all such directions as to the further conduct of the action as might be given on a summons for directions under Order XXX., and may order the action to be forthwith set down for trial."[93]

"A special list shall be kept for the trial of causes in which leave to defend has been given under this Order, and in which the Judge is of opinion that a prolonged trial will not be requisite; and the Judge

[89] Annual Practice of the Supreme Court for 1911, Vol. 1, Order 14, Rule 4, p. 154.
[90] *Id.* Order 14, Rule 5, p. 155.
[91] *Id.* Order 14, Rule 6, p. 155.
[92] *Id.* Order 14, Rule 7, p. 161.
[93] *Id.* Order 14, Rule 8 (a), p. 162.

may, if he thinks it advisable, order any such action to be put into such list."[94]

"The costs of and incident to all applications under this Order shall be dealt with by the Judge on the hearing of the application, who shall order by and to whom, and when the same shall be paid, or may refer them to the Judge at the trial. Provided that in case no trial afterwards takes place, or no order as to costs is made, the costs are to be costs in the cause."[95]

"If the plaintiff makes an application under this Order where the case is not within the Order, or where the plaintiff in the opinion of the Judge knew that the defendant relied on a contention which would entitle him to unconditional leave to defend, in any of such cases the application shall be dismissed with costs to be paid forthwith by the plaintiff."[96]

"A tenant shall have the same right to relief after a judgment under this Order for recovery of land on the ground of forfeiture for non-payment of rent as if the judgment had been given after trial."[97]

This suggestion as to summary judgment was also proposed by David Dudley Field and John F. Dillon as a special committee of the American Bar Association on the delay and uncertainty in judicial administration.[98]

It has also been suggested that no notice of entry of an order or judgment should be rendered ineffectual for the purpose of limiting the time of the party served with it to take an appeal by reason of any informality in such notice or in the copy of the order, judgment or other determination served therewith, unless such informality shall actually mislead such adverse party to his prejudice.[99]

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[94]Annual Practice of the Supreme Court for 1911, Vol. 1, Order 14, Rule 8 (b), p. 162.
[95]*Id.* Order 14, Rule 9 (a), p. 164.
[96]*Id.* Order 14, Rule 9 (b), p. 165.
[97]*Id.* Order 14, Rule 10, p. 166
[98]Report of the American Bar Association, 1885, pp. 323-364.
[99]This recommendation was endorsed by the Association of the Bar of the City of New York and a bill embodying it was passed by the Senate.

It has also been recommended that the equity practice of making the dismissal of a complaint a final determination of the suit, unless leave to renew the action was given, or the dismissal was expressly stated to be without prejudice, should be adopted in all cases.[100]

It has been suggested that the decision upon a demurrer should be treated as an order and not as a judgment and that no interlocutory judgment should be entered upon a demurrer.[101]

Some simplification could be accomplished if the practice in Pennsylvania relating to the entry of judgment were followed. In our state except in the simplest cases, the proposed judgment contains verbose and unnecessary recitals and there is usually a notice of settlement. In Pennsylvania four days after a jury trial, if no motion for a new trial has been filed, the clerk as a matter of course enters the judgment by a suitable entry in the docket of the case.

The principle that should govern the drafting of a legislative practice act with respect to the provisions relating to the judgment in an action is as follows:

RULE 5. *The court should have power to grant any relief and to render any form of judgment in favor of any party or parties as against any other party or parties that the facts warrant.*

APPEALS

It would take a long time to discuss fully the subject of appeals and especially the rules relating to the questions reviewable under the record on appeal.

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[100]This recommendation was endorsed by the Association of the Bar of the City of New York and a bill embodying it was passed by the legislature, but did not become a law.

[101]This recommendation was made by the Special Committee of the Bar Association of the City of New York on Simplification of Procedure, and was endorsed by the Association. A bill embodying the suggestion was introduced in the legislature and passed the Senate of 1910.

The general practice of our appellate system has come to be one of great technicality. The idea underlying the appellate system seems to be that the appellate court is purely a court for the correction of errors and that questions that were not presented to or decided by the court below are not open for review on the ground that the trial court can not be guilty of an error upon an issue not presented or upon a ruling not made.

I do not mean to say that the appellate courts do not look at the merits of a case and, having become convinced where justice lies, that they do not endeavor to bring it about, but their hands are tied in many instances by the theory underlying our appellate system and by technical rulings made by the courts themselves. As a result in many cases the maxim is literally true: "Summum jus, summa injuria."

The whole record should be examined upon appeal and justice which is the purpose of litigation should be done without regard to technical considerations not affecting the merits. The case should not resolve itself into an inquiry as to whether or not a particular question has been raised by an exception and as to whether or not the exception is broad enough to cover the error.

No new trial should be had unless necessary or proper and the appellate courts should look into the record of the case instead of the exceptions and reverse, affirm or modify, according to the justice of the whole case.[102] The evils of numerous trials would thereby be lessened and much of the delay in litigation would be avoided.

Various recommendations made by the Special Committee of the Association of the Bar of the City of New

[102]Michigan Law Review, Art. III, No. IV; "The Abuse of New Trials," by Everett P. Wheeler.

York on Simplification of Procedure related to appeals as follows:

The appellate division should be permitted to exercise all of the constitutional power that it has as the successor of the chancellor to award final judgment on appeal from the special term and from surrogates, instead of merely granting new trials as it does now under certain technical precedents. On all appeals in civil cases, the appellate division should have the same power to disregard technical errors, that it has, and the old general term had, in appeals in criminal cases since the adoption of the Code of Criminal Procedure.[103]

An appeal from a judgment entered upon the verdict of a jury, should bring up for review the question of fact as to whether the verdict is contrary to the evidence, without requiring the present additional appeal from an order denying a motion for a new trial upon the trial judge's minutes, if the appellant desires to raise any question of fact.[104]

Upon a reversal by the appellate division, in any case, it should be presumed that the reversal was upon the law only, unless the contrary appears in the order or judgment of reversal; thus making the rule now applicable on appeals from special term judgments also applicable to appeals from trial term judgments.[105]

Upon an appeal to the court of appeals, the opinion of the appellate division should, for the purposes of the appeal, be deemed a part of the judgment roll or appeal papers.[106]

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[103]This recommendation was endorsed by the Association of the Bar of the City of New York and a bill embodying it was passed by the Senate in 1910.

[104]This recommendation was endorsed by the Association of the Bar of the City of New York and a bill embodying it was passed by the Senate in 1910.

[105]This recommendation was endorsed by the Association of the Bar of the City of New York and a bill embodying it was passed by the Senate in 1910.

[106]This bill was endorsed by the Association of the Bar of the City of New York and a bill embodying it passed the legislature, but was vetoed by the Governor.

Our practice has become an "appellate system" as Mr. Justice Hirschberg said before the Commission on the Law's Delays.[107] This evil has grown up from the ease with which judgments can be reversed on technicalities on appeal. Mr. Justice Gaynor said before the same commission: "The present condition is that we are top-heavy in this state with appeals,"[108] and under the present decisions "every defeated party," said Mr. Justice O'Gorman, "is willing to take a chance of securing a reversal on appeal."[109]

The English practice is much more restricted in the matter of appeals and there is no reason why the evil can not be remedied in the practice in this state. As suggested by the State Bar Association and the special committee of the Association of the Bar of the City of New York, the rule applicable to criminal cases should be applied to civil cases. The code of criminal procedure provides that: "After hearing the appeal, the court must give judgment, without regard to technical errors or defects or exceptions which do not affect the substantial rights of the parties."[110] This is the language which the special committee of the Association of the Bar of the City of New York would incorporate in section 1317 of the Code of Civil Procedure.[111]

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[107] Report of the Commission on Law's Delays, p. 270.

[108] *Id.* p. 267.

[109] *Id.* p. 319.

[110] Code of Criminal Procedure, § 542.

[111] Report of the Special Committee of the Bar Association of the City of New York on Simplification of Procedure, November 1, 1909, p. 29.

The language of president Taft to accomplish this reform in civil practice is:

> "No judgment of the court below should be reversed except for an error which the court after reading the entire evidence can affirmatively say would have led to a different verdict."[112]

The language of the Special Committee of the American Bar Association is:

> "No judgment shall be set aside or reversed or new trial granted * * * unless in the opinion of the court * * * it shall appear that the error complained of has resulted in a miscarriage of justice."[113]

The greater liberality of the rule under the criminal practice is very aptly illustrated in the case of People v. Strollo (191 N. Y., 42), where the court refused to grant a new trial in a capital case because the record contained translations of important handwriting exhibits instead of the originals which had been lost. In the Court of Appeals the question raised by this state of facts was discussed by Judge Werner who said:

> "We might have a condition in which we would be compellel, in a civil case, to grant a new trial for a loss of original documentary evidence, although under similar conditions, in a case involving human life and liberty, we may be bound to deny such relief. And why should this seemingly anomalous difference exist? Because this is a court of statutory origin and vested with none but statutory jurisdiction. Thus it happens that in civil cases our powers are limited to the review of errors which are raised and presented by exceptions, while in criminal cases we are not only empowered but commanded to give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties. (Code Crim. Pro. § 542.) This power of review on criminal

[112]15 Yale Law Journal 1.
[113]Report American Bar Association, 1910, p. 646.

appeals is still further broadened in capital cases by the legislative direction that 'when the judgment is of death, the Court of Appeals may order a new trial, if it be satisfied that the verdict was against the weight of evidence or against law, or that justice requires a new trial, whether any exceptions shall have been taken or not in the court below.' (Code Crim. Pro. § 528.)"[113a]

It has been suggested that the appellate courts should have power to take evidence in certain cases in order to render judgment according to the merits of the case. The granting of new trials has grown to be a great evil, and cases are frequently retried many times. This could be obviated if the rule in England were to prevail which grants to its court of appeal full discretionary power to receive further evidence upon questions of fact.

The English rule is as follows:

"The Court of Appeal shall have all the powers and duties as to amendment and otherwise of the High Court, together with full discretionary power to receive further evidence upon questions of fact, such evidence to be either by oral examination in Court, by affidavit, or by deposition taken before an examiner or commissioner. Such further evidence may be given without special leave upon interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought. Upon appeals from a judgment after trial or hearing of any cause or matter upon the merits, such further evidence (save as to matters subsequent as aforesaid) shall be admitted on special grounds only, and not without special leave of the Court. The Court of Appeal shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require. The powers aforesaid may be exercised by the said Court, notwithstanding that the notice of appeal may be that part only of the decision may be reversed or varied, and

[113a] As to rule in civil cases, see 195 N. Y., 62.

such powers may also be exercised in favor of all or any of the respondents or parties, although such respondents or parties may not have appealed from or complained of the decision. The Court of Appeal shall have power to make such order as to the whole or any part of the costs of the appeal as may be just."[114]

The special committee of the American Bar Association to suggest remedies and formulate proposed laws to prevent delay and unnecessary cost in litigation suggested the following principles governing appeals:

"No judgment should be set aside or new trial granted for error as to any matter not involving the substantive law or the facts, that is for error as to any matter of procedure, unless it shall appear to the court that the error complained of has resulted in a miscarriage of justice."

"An appeal should be treated as a motion for a rehearing or new trial or for vacation or modification of the order for judgment complained of, as the cause may require, before another tribunal. Upon any appeal, in any sort of cause, the court should have full power to make whatever order the whole case and complete justice in accord with substantive law may require, without remand, unless a new trial becomes necessary."

"In case a new trial is granted, it should only be a new trial of the question or questions with respect to which the verdict or decision is found to be wrong, if separable."

"Any court to which the cause is taken on appeal should have power to take additional evidence, by affidavit, deposition or reference to a master, for the purpose of sustaining a verdict or judgment whenever the error complained of is lack of proof of some matter capable of proof by record or other incontrovertible evidence, defective certification or failure to

[114]English Practice, Order 58, Rule 4.

lay the proper foundation for evidence which can, in fact, without involving some question for a jury, be shown to be competent."[115]

Upon the latter proposition the following is the discussion of the special committee of the American Bar Association:

"Lack of power in appellate tribunals to take evidence to correct mere formal defects or to supply deficiencies as to which there is record evidence or the evidence cannot admit of any substantial dispute is a serious defect in our procedure. For example, in a recent case a judgment was reversed because the law of another state was proved by what every practitioner in the latter state well knows to be the compilation of statutes in general use therein. The court that rendered this decision probably had no doubt that the sections in question were in fact the law of the state in question, and would have accepted them as such in an argument on a point of law. But the delay and expense of a new trial were necessary because the undoubted law of the foreign state was not proved in the right way. If the court of review had had power to take evidence upon this simple point, which did not admit of any real controversy, the point would not have been raised. It has been objected that a power of receiving evidence on appeal would result in taking up the time of appellate tribunals unduly with applications to take evidence and controversies over matters of fact. Such is not the experience in England, where a much wider power of receiving evidence on appeal exists than that which we recommend. Moreover, such applications will not be made and such controversies will not arise because errors will not be urged on appeal where they may be corrected speedily and without reversal, by application for leave to supply the omitted formal, record or preliminary proof.

[115] American Bar Association Reports, 1910, p. 645.

The Revised Code of Civil Procedure of Kansas, recently enacted, contains the following provision (§ 580):

'In all cases except those triable by a jury as a matter of constitutional right, the Supreme Court may receive further testimony.'

In the opinion of the committee, the power to take new testimony generally, in the discretion of the reviewing court, in equity causes, is wisely conferred. But the committee do not believe it wise to deny this power wholly in causes triable to juries. Even in cases of the latter type, the power should be granted to take proof of matters of record, or matters capable of incontrovertible proof so far as necessary to sustain verdicts. Such a practice is in no wise an infringement of jury trial. It prevents a new trial where the only purpose of the new trial is to take proof of a matter on which there could be only one finding, and that finding, if made in the appellate tribunal, would sustain the verdict."[116]

The rule at common law is stated in Ritchie v. Putnam (13 Wend., 524), as follows:

"Record evidence of a fact imperfectly proved at the trial may be exhibited, on the argument of the case, in opposition to a motion for a new trial; such evidence being in its nature incontrovertible, it would be idle to send the cause down to a new trial, for the purpose of taking it. The practice of the court in this respect, is well settled."

It is stated that in England final judgment is rendered on appeal in 90% of the cases in which the judgment below is reversed and that in only 10% of the reversals is a new trial ordered.[117]

A good deal of time is consumed on appeals from interlocutory judgments and orders which might be saved if the

[116] 1909, p. 598, *et seq.*
[117] Report American Bar Association, 1910, p. 631.

practice prevailing in Pennsylvania were to be adopted. In the state of Pennsylvania no appeal lies from an interlocutory judgment or from an order but only from a final judgment which brings up for review the entire record. On this subject, a member of the Special Committee of the Association of the Bar of the City of New York on the Simplification of Procedure said:

> "The common law rule, limiting appeals to final judgments, was the outgrowth of centuries of experience; it is a rule in active operation to-day, in Pennsylvania; it is a rule whose expediency is amply demonstrated by experience; and it is a rule whose abrogation is costing the taxpayers of New York State hundreds of thousands of dollars a year, in the time of appellate judges devoted to the consideration of matters that do not decide the merits of any controversy whatever, but go to bare matters of procedure."[118]

Another suggestion made on the subject of appeals relates to the practice touching the settlement of cases on appeal requiring the stenographic notes of testimony to be reduced to narrative form. This practice is objected to upon the ground that it is a waste of time and that the record does not present an accurate picture of the proceedings upon the trial. In place of this practice it is suggested that the rule in Pennsylvania be followed. In that jurisdiction at the close of a charge, before the jury retires, counsel requests the court to order the stenographic notes of the testimony and charge to be written out and filed. The notes are then written out in the form of question and answer certified both by the stenographer and the judge and this record which presents the entire case is used on appeal.

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[118] "A discussion of New York Procedure," by C. Andrade Jr., p. 4.

The principle that should govern the drafting of a legislative practice act with respect to the provisions relating to appeals is as follows:

RULE 6. *No judgment should be set aside or new trial granted unless it appears that the error has resulted in the miscarriage of justice, and, so far as it can be done constitutionally, only as to such questions as to which the error was committed and the appellate courts should have power to take additional evidence so far as they can be given that power.*

SATISFACTION OF JUDGMENT

The attention of the State Bar Association has been directed to the evils of arrest and execution against the person as a means of collecting a claim but though committees have reported upon the matter, no bills carrying out the recommendations of the committees have succeeded in passing the legislature.

In an address before the New York State Bar Association in 1896 Mr. William B. Hornblower said upon this subject:

> "I would suggest also that the provisions as to arrest and execution against the person should be stricken from the Code. They have been so altered by the Legislature that they have become practically obsolete as a mode of collecting a claim, and they now remain on the statute as relics of a past age. As punitive measures they are ineffective. If a grand jury of a county cannot be got to indict a man then we should not be allowed to go to a judge on affidavits. The process is frequently used for extorting money and for blackmail."[119]

[119] Report of New York State Bar Association, 1896, p. 161.

In 1905 Mr. Justice Charles E. Hughes in a paper on the same subject before the State Bar Association said:

> "Save in cases of contempt of court, and where it may be necessary to arrest the defendant in order to insure the performance of an act, the failure to perform which would be punishable as a contempt (Code of Civil Procedure § 550), arrest and imprisonment in civil cases should be abolished."[120]

The subject matter of this paper was referred to the law committee of the association and that committee made a report in 1908 recommending legislation which would carry out the suggestions contained in the paper. The association thereupon adopted a resolution favoring such legislation and providing for the appointment of a committee "to prepare and present to the legislature an act or acts for that purpose." This committee made an extensive report in 1910, but action upon its proposed bills was postponed. The committee will present a further report this year.[121]

The Committee of Fifteen of the State Bar Association made the following suggestion with reference to abolishing the right of redemption of real estate from sale under execution:

> "Nor is there any reason for the retention of the right of redemption of real estate from sale under execution by which the purchaser is deprived of possession during a period of fifteen months, no matter how small in value the real estate may be, while personal property to the value of hundreds of thousands of dollars, if that amount be involved, may be sold under execution upon six days' notice by the sheriff without any right of redemption. This provision, as also that with regard to redemption, is a relic of that

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[120]Report of New York State Bar Association, 1905, p. 170.

[121]The members of this committee are Frank Harvey Field, Francis Lynde Stetson, Macgrane Coxe and James T. Rogers.

> inordinate respect for title to real estate which grew up under the feudal system. They survived the revised statutes which did so much to place real estate and personal property upon the same footing as to rights and privileges, but no reason exists for their further continuance, and they may well be eliminated from a code of procedure."[122]

In this connection attention might be called to the simplicity of the English practice with reference to sales by the court:

> "If in any cause or matter relating to any real estate, it shall appear necessary or expedient that the real estate or any part thereof should be sold, the Court or a Judge may order the same to be sold, and any party bound by the order and in possession of the estate, or in receipt of the rents and profits thereof, shall be compelled to deliver up such possession or receipt to the purchaser, or such other person as may be thereby directed."[123]

The satisfaction of a judgment is also much simpler in Pennsylvania than it is in this State. There no order is necessary except in certain cases but an entry is made in the docket of the case that it has been discontinued or settled or satisfied. The plaintiff's attorney makes this entry himself or he may authorize the clerk of the court to make it.

The principle that should govern the drafting of a legislative practice act with respect to the provisions relating to the satisfaction of the judgment is as follows:

RULE 7. *The provisions for the satisfaction of a judgment should be such as to afford a prompt and effective enforcement of the judgment.*

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[122]Report of the Committee of Fifteen, p. 24.

[123]Annual Practice of the Supreme Court for 1911, Vol. 1, Order 51, Rule 1, p. 809.

REVISION OF THE COURT RULES

The court rules should be included in any plan for a revision of the practice.

The court rules contain not only rules of court properly speaking but substantive provisions which should be removed from the rules to the statutes where similar provisions are found.

The committee on law reform of the New York State Bar Association in its report on code revision called attention to the failure under the present system of preserving a distinction between statutes and rules, "the present rules of the Supreme Court containing very many matters of equal importance to those in the code, and the code containing very many matters of detail properly belonging in the rules."

CHECKS UPON AMENDMENTS TO THE PRACTICE ACTS

When the classification, consolidation and revision of the practice acts has been accomplished some check upon too frequent and ill-advised amendments should be provided. Amendments should be subject to the supervision of some authority before their passage by the legislature. If no statutory board can be secured by appropriate legislation a strong committee of the bar associations might be able to preserve the integrity and symmetry of the practice when once properly established.

SUITABLE INDEX FOR THE PRACTICE ACTS

When the practice acts have been revised and the material in them confined to matters of practice, a comprehensive and perfect index should be made. This work should be so thoroughly done that the heads and subheads would be accepted by publishers generally and so that there would not be the confusion arising from having indexes arranged

under different heads and sub-heads. With the provisions of the practice acts logically arranged according to the steps in the progress of an action and with one standard index with recognized heads and sub-heads, the profession would soon know from memory where to find the various subjects.

CODE OF CRIMINAL PROCEDURE

The evils of the present criminal procedure in the courts has received quite as much attention in this state and elsewhere as the delays and uncertainties of the civil practice. The same criticism that has been directed against the civil practice has been made against the criminal practice. The treatment that has been recommended herein for the correction of the civil practice could be applied to the criminal practice. It could be classified, consolidated and revised to great advantage. Eminent authorities have directed attention to the evils of the practice in the criminal courts and the matter has and is now attracting the serious attention of students of criminal law and valuable reports have been made upon the subject. An extensive report was made by members of the Committee on Reform in Legal Procedure of the American Institute of Criminal Law and Criminology, who visited England for the purpose of making a study of criminal procedure in that country. Space will not permit of a review of this valuable report or a detailed discussion of the evils of the criminal practice in this state, but the subject should not be passed by without giving the recommendations made by this committee:

1. All objections to the indictment should be made before evidence is heard, and errors in matter of form amended at once.

2. The prosecuting attorney and counsel for the defense should before trial consider and discuss the

qualifications of the individual members of the jury panel and agree to the dismissal of any one clearly incompetent to be a juror.

3. The voir dire should be limited to the asking of questions strongly tending to show incompetency or bias in the present trial.

4. All prisoners on trial upon indictment, who are unable to employ counsel, should be furnished with legal assistance throughout the trial, including the arraignment.

5. The prosecuting attorney, instead of being a partisan, should investigate the case from a non-partisan standpoint, and should make an impartial presentation of the evidence to the jury.

6. The fee system, wherever it exists, for the compensation of prosecuting attorneys, should be abolished.

7. Counsel for the prisoner should defend him by endeavoring to disprove his guilt, and never by injecting error in the record.

8. The trial judge should not be a mere presiding officer, but should take an active and controlling part in the trial. He should restrict counsel to the asking of relevant questions. He should promptly overrule and discourage technical objections. He should never permit counsel to intimidate or improperly to confuse a witness. He should sum up the evidence to the jury and direct them as to the law applicable thereto.

9. New trials should never be granted for technical errors, but only to prevent miscarriage of justice.

10. Prosecutions for minor offenses, where the accused is not likely to evade the hearing, should be begun by summons, as in civil cases.[124]

[124]The members of this Committee were John D. Lawson, Professor of Law in the University of Missouri, and Edwin R. Keedy, Professor of Law in the Northwestern University. See Report in the Journal of the American Institute of Criminal Law and Criminology, Vol. 1, No. 4, p. 595; No. 5, p. 748.

CONCLUSION

It is apparent from these suggestions that not only a reformation but a revolution could be effected in the practice in the courts without disturbing our present system of a legislative practice act supplemented by rules of court, without seriously interfering with our present practice and without seriously discommoding the profession. If there could be a logical arrangement of the practice according to the progress of an action through the courts bringing together every provision relating to each subject; if there could be but one form of action in place of our present actions and special proceedings, so that the form of remedy in each case would be the same; if limitations as to joinder of parties could be removed so as to give the greatest latitude in that respect; if there could be no restriction as to joinder of causes of action except the requirement as to separate trials when deemed necessary by the court; if there could be promulgated simple forms of pleadings with the greatest liberality as to their construction and amendment; if there could be established an "omnibus motion" for the disposition of all preliminary relief desired in an action; if there could be provided a "summary judgment" for commercial causes so that this class of cases could be promptly disposed of; if, so far as it can constitutionally be done, provision were made for the disposition of questions of fact on one trial and appellate courts were given power to take evidence to sustain a verdict or judgment; and if all of the incidental changes necessary to carry out these suggestions in the spirit of a simple, uniform and flexible practice could be made we would indeed feel that we had reached the golden age in procedure in the courts and the state would set a new

mark in civil practice for the world to follow as it did in 1848.[125]

It was sixty-nine years after the adoption of the first state constitution in 1777 that the people of the state demanded in the constitution of 1846 a revision of the practice in the courts which demand resulted in the passage of the Code of Procedure. Another period of sixty-nine years will have rolled around in 1916 and unless some action is taken toward a revision of the present practice the people may again resort to the expedient of a constitutional amendment that was adopted in 1846.

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[125] "The New York Mail gives the following information as to the extent to which our New York Codes have been adopted in other communities. In most instances the Codes have been adopted substantially in detail, and in others in principle: 'The first New York Code, the Code of Civil Procedure, went into effect on the 1st of July, 1848. It was adopted in Missouri in 1849; in California in 1851; in Kentucky in 1851; in Ohio in 1853; in the four provinces of India between 1853 and 1856; in Iowa in 1855; in Wisconsin in 1856; in Kansas in 1859; in Nevada in 1861; in Dakota in 1862; in Oregon in 1862; in Idaho in 1864; in Montana in 1864; in Minnesota in 1866; in Nebraska in 1866; in Arizona in 1866; in Arkansas in 1868; in North Carolina in 1868; in Wyoming in 1869; in Washington Territory in 1869; in South Carolina in 1870; in Utah in 1870; in Connecticut in 1879; in Indiana in 1881. In England and Ireland by the Judicature Act of 1873; this Judicature Act has been followed in many of the British Colonies; in the Consular Courts of Japan, in Shanghai, in Hong Kong and Singapore, between 1870 and 1874. The Code of Criminal Procedure, though not enacted in New York till 1881, was adopted in California in 1850; in India at the same time with the Code of Civil Procedure; in Kentucky in 1854; in Iowa in 1858; in Kansas in 1859; in Nevada in 1861; in Dakota in 1862; in Oregon in 1864; in Idaho in 1864; in Montana in 1864; in Washington Territory in 1869; in Wyoming in 1869; in Arkansas in 1874; in Utah in 1876; in Arizona in 1877; in Wisconsin in 1878; in Nebraska in 1881; in Indiana in 1881; in Minnesota in 1883. The Penal Code, though not enacted in New York until 1882, was adopted in Dakota in 1865 and in California in 1872. The Civil Code, not yet enacted in New York, though twice passed by the Legislature, was adopted in Dakota in 1866 and in California in 1872, and has been much used in the framing of substantive laws for India. The Political Code, reported for New York but not yet considered, was adopted in California in 1872. Thus it will be seen that the State of New York has given laws to the world to an extent and degree unknown since the Roman Codes followed Roman conquests."—Albany Law Journal, Vol. XXIX, p. 261, April 5, 1885.

The serious condition of judicial administration in this state has been emphasized so often by those in and out of the profession and has been experienced so disastrously by litigants that it has made a deep impression upon the public mind and the time has come when it is imperative that the profession should protect itself against the imputation of impeding a correction of the evils and should enter vigorously into a movement for the reform of the procedure in the courts.

The profession has been charged with being "notoriously suspicious of changes" and as "hitherto opposed to every great legal reform" and the charge is not without evidence to sustain it. The profession has not looked with entire indifference upon the conditions that prevail in the administration of justice, it is true, but it has not exercised that great power in the community which it is credited with and which if properly exerted would long since have brought about a reform in the procedure. A large part of the legislature of the state each year consists of members of the profession. Members of the bar fill many of the important executive offices in the administration of private and public affairs. They occupy every bench of justice and in this capacity are able impartially to appreciate the long delays, the intricacies and the perplexities in the administration of the law. Notwithstanding this great influence and this intimate knowledge of conditions, for a period of thirty-five years since the adoption of the Code of Civil Procedure there has been no substantial revision of the practice. As an excuse in some measure for the failure of the profession to discharge this important duty it must be admitted that the task is not an easy one. "An ideal code" says Sir James Stevens, "should be drawn by a Bacon and settled by a Coke." But while a perfect code is an impossibility, we should not hesitate on that account to endeavor to arrive as near perfection as we can. The work must be well done or the effect will be as Bacon says: "Like the apothecary's

drugs; though they remedy the disease, yet they trouble the body."

We have taken the constitutional oath of office which binds us not only to support the provisions of the constitutions but to do all in our power to further the interests of justice. We are officers of the court and as such have a duty to see that justice is not only equitably but expeditiously administered. We are not only bound to protect the rights of our clients to the full extent of their claims but we are under obligations to see that those claims are adjusted as promptly and as speedily as possible when resort to the courts becomes necessary.

We all know that these obligations have not been fulfilled. We all know that compared with the great power and influence of the legal profession the efforts to rectify the evils in the administration of justice have been weak, spasmodic, indifferent and ineffective. We know the judicial history of the state and we are aware of the defects of the common law practice as it existed for over half a century. We are aware of the improvement brought by the Code of Procedure and the example which the State of New York set by its adoption for the rest of the civilized world in the matter of the practice in the courts. Since then we have seen the English speaking people across the ocean improve upon the system which we inaugurated and yet we have allowed our own system to go backward while the world has moved on.

The average member of the profession is not in a position to do any of the actual work of revising the statutes but he has a voice in such matters as a member of the bar and could if he desired make himself heard and his influence felt. The profession of the law is a jealous mistress and the fulfillment of obligations to clients takes all of the time of most of her votaries but there is not a member of the profession so inexperienced or so uninfluential or so engrossed in his daily work that he cannot devote some time to and

exert some influence toward furthering a reform which would not only benefit himself but his clients. The law is not a trade but a science and the practice of the law is not a business but a profession and there are certain ideals that every lawyer must keep in mind if he would make himself worthy of his great calling. Among other things he should be willing to make some sacrifices for the advancement of justice between his fellow-men upon a fair and impartial administration of which rests the very foundations of our government.

We owe it to ourselves as members of the legal profession, we owe it to ourselves as members of the community in which we live and we owe it to ourselves as citizens of the great State of New York to rise and demand a practice act which will be a model for simplicity, flexibility, uniformity and expedition, copying no existing system but selecting the best from our own and other jurisdictions — a practice act which will be adjusted to the requirements of modern business, modern methods and modern ideas, giving each man whether he be rich or poor an equal chance before the law and a speedy determination of his controversies in the courts.

If such a reform can be accomplished we would indeed realize the exalted sentiment expressed by Lord Brougham when he said:

> "Law reform! How noble will be the sovereign's boast when he shall have it to say that he found law dear and left it cheap; found it a sealed book, left it a living letter; found it the patrimony of the rich, left it the inheritance of the poor; found it the two-edged sword of craft and opposition, left it the staff of honesty and the shield of innocence."

ADOLPH J. RODENBECK.

Rochester, January second,
Nineteen hundred eleven.